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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

OSCAR MERCADO, MARICELA QUISPE, APPELLANTS,	)	Appellants Opening Brief
V.	)	Appeal Case No. 20100627
LINDSEY HILL, DIAMOND LINE DELIVERY SYSTEM, APPELLEES.	)	District Ct. No. 070403371

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UTAH APPELLATE COURTS
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TABLE OF AUTHORITIES

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Jurisdiction.

The Utah Court of Appeals has jurisdiction pursuant to Utah Code Ann. §78A-4-103.

Statement of Issues Presented for Review, Standard of Appellate Review, Authority,& Citation to Record.

Summary of Argument.

1. Whether the trial court erred as a matter of law and abused its discretion in denying Appellants Mercados' motion to quash the requests for admissions.

   This issue is based on a conditional discretionary standard. First, The condition is whether withdrawing the admissions would serve the presentation of the merits; and whether withdrawal would prejudice the other party. If the condition is met, then the trial court has discretion to allow withdrawal of the admissions. Brunetti v Mascaro, 854 P.2d 555, 558 (Ut Ct App 1993). This issue was preserved for appeal and was discussed by the trial court on May 14, 2010, appdx. Pps. 31-34. The trial court failed to analyze the condition and abused its discretion in denying the motion to quash the admissions.

2. Whether the trial court erred as a matter of law in denying the motion for new trial.

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This motion was presented below on April 15, 2010. See Appdx. 2, p. 1-2. The standard on review is an abuse of discretion. The trial court should use its discretion to correct findings in error where there is substantial doubt that issues were fairly tried. Page v. Utah Home Fire Ins. Co., 15 Ut.2d 257, 391P.2d 290 (1964). Also, a new trial should be granted if there is substantial evidence in favor of the party moving for the new trial. Creeling v. Thomas, 122 ut. 122, 247 P.2d 264 (1952). There is no evidence to support the trial court's findings and summary judgment and a new trial should be granted.

3. Whether the trial court erred as a matter of law in entering summary judgment in favor of defendants.

The trial court entered summary judgment on January 25, 2011, in favor of Defendant Diamond Line Delivery System; and on June 11, 2010 in favor of Defendant Hill. Plaintiffs filed to alter or amend the January 25 judgment on Febraury 8, 2010. The trial court denied the motion to alter or amend the judgment on June 11, 2010. See Appdx. 4, p. 8. Plaintiffs timely appealed these decisions. These decisions are reviewed to consider any facts in dispute. Any genuine issue means there is no basis for summary judgment. Young v. Felornia, 121 Ut. 64, 65, 244 P.2d 862 (1954). There is no evidence to support

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the trial court's findings and summary judgment and it should be reversed. The summary judgment is preserved for appeal by appealing the judgment.

4. Whether the trial court entered findings of fact that are not supported by substantial evidence and are erroneous.

This issue is decided by whether all facts, when viewed in the light most favorable to the party against whom judgment was granted may support a finding in its favor. Barbers v. Farmers Ins. Exchange, 751 Pl2d 2478 (Ut.App.1988).

This issue is preserved by the Findings that were entered with the judgment below. Apdx. 5, lns. 1-7. The findings were challenged in plaintiffs' motions, filed Febr. 8, 2010 and preserved for appeal. See Apdx. 2, pps. 3-6, 16-19, 44-47, 51-59, and attachments.

NATURE OF CASE

Plaintiffs Appellants were injured in a car accident on February 7, 2007. They were driving south on I-15 at dusk when they saw a tractor-trailor stopped in their lane. They slammed on their brakes and came to a stop. Its driver ran out of gas and left the vehicle in the lane of traffic. Defendant Hill was following Plaintiffs and slammed on her brakes but ran into the rear end of Plaintiffs.

Defendants served requests for admissions on Counsel for Plaintiffs and asked plaintiffs to admit that the defendants were not at fault in causing the rear-end collision, that plaintiffs were at fault, and that plaintiffs were not injured. The alleged admissions were false statements. Counsel for plaintiffs did not receive the admissions. The discovery period under the scheduling order had expired.

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Counsel for Plaintiffs failed to timely answer the requests for admissions. The trial court granted summary judgment based on the admissions.

Counsel for Plaintiffs-Appellants moved to quash or withdraw the admissions and for a new trial to overcome the summary judgment. The trial court denied all motions. The issue is whether the failure to answer requests for admissions may be overcome by quashing the admissions and obtaining a new trial.

Course of Proceedings and Disposition Below.

The complaint was filed in November 2007. Discovery took place to April 30, 2009. Interrogatories, requests for production, and depositions were served, answered and scheduled. The depositions were not completed by the end of discovery. A new discovery order proposed extending discovery to July 31, 2009. The order was not entered.

Defendants then, on September 2, and 8, 2009, served requests for admissions on counsel for plaintiffs. They immediately applied for summary judgment after the admissions were not timely denied. The admissions stated that plaintiffs were at fault, defendants were not at fault, and plaintiffs were not injured in the accident. The trial court granted summary judgment.

Counsel for plaintiffs untimely asked for more time to respond to the motions for summary judgment. He also moved to quash the admissions and

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requested a new trial to set aside the summary judgment. He asked for a hearing so the trial court could hear all of the motions. The trial court denied all motions and the request for a hearing. It entered judgment, findings of fact and conclusions of law based on the deemed admissions and found plaintiffs were at fault in causing the rear-end collision where Defendant Hill ran into the back of Plaintiffs of the I-15 interstate, defendants were not at fault, and plaintiffs were not injured.

Statement of Facts.

1. Plaintiffs-Appellants Mercado and Quispe (herein called "Appellants Mercado" since they are husband and wife), on August 15, 2006, were driving south on Interstate 15 near Lehi, UT, when they suddenly had to stop because a tractor-trailer driven by Defendant-Appellee Diamond Lines Delivery System was stopped in their traffic lane in front of them. As soon as Plaintiffs came to a stop to avoid hitting the vehicle in front of them they were hit in the rear of their vehicle by another vehicle. They were stopping for Defendant-Appellee Diamond Lines Delivery Service (herein "Appellee DLDS"). They were hit in the rear by Defendant-Appellee Lindsey Hill ("Appellee Hill"). Both Appellants Mercado plaintiffs suffered soft tissue damage in their backs, lost wages and continuing disability. Appellant Oscar Mercado suffered a fractured pelvis.

2. The trial court approved a Stipulated Discovery Plan on December 9, 2009. A copy is provided in the Appendix 3, pages 1-3. Fact discovery had to be

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completed by April 30, 2009. See page 2 of 5. Interrogatories and requests for production were served on January 5, 2009. See trial court docket, Appdx. 5, pages 4. And Plaintiffs depositions were scheduled. Id. A new proposed stipulated discovery was circulated but it was not filed. It proposed the discovery deadline be extended to July 31, 2009. Defendants served Requests for Admissions on September 2 and September 8, 2009. See Appdx.5, trial court docket, p. 4. Then defendants, on September 10, 2009, filed a request to submit for decision on motion for entry of scheduling order. The court, on October 1, 2009, filed the new second amended discovery plan and order. Appdx.3, p.5.

3. Appellees, on or about September 2 and 8, 2009, mailed Requests for Admissions to counsel for Appellants Mercado. They also filed motions to compel production at about the same time. Appdx. 5, pps. 4-5.

4. During the same time period, from June through November 2009, counsel for Appellants Mercado moved his office to four different locations. Counsel had maintained an office at 345-B East University Pkwy until Febr. 1, 2009. Appdx. 4, pps. 21-22, Ct. Order re quash admis., Para. 1, 4. He then moved to 251 West Riverpark Dr.,Suite 100, Provo, UT. Id., para. 5. He was there from Febr. 1, 2009, to June 15, 2009. He moved from this address to a home office on June 15, 2009. Id., para. 9. Then he moved to 575 South State St., Orem, UT, from November 1 to December 8, 2009. Id., Para. 17. Then he moved to his current address on

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December 8, 2009. Id. The discovery requests were lost in the mail.

5. Appeellees then served motions for summary judgment on October 23 and 28, 2009, asking that the case be dismissed because the requests for admissions had not been answered and were deemed admitted. Appellants Mercado responded through counsel to the motions for summary judgment on November 25, 2009, and requested an extension of time to respond. Appdx. 5, p. 5-7.

6. The requests for admissions stated totally false statements. They asked Appellants Mercado to admit they were negligent in causing the automobile accident and that they were not injured. The requests also asked for an admission by Appellants Mercado that appellees were not negligent in causing the motor vehicle accident. Appdx. 1. Counsel for Appellants Mercado failed to timely respond to the requests for admissions. The trial court, On December 7, and 15, 2009, granted summary judgment based upon the admissions being deemed admitted.

7. Plaintiffs, on December 24, 2009, filed a motion and memorandum to quash or withdraw admissions. Appdx. 2, pps. 51-52. They also filed objections to defendants' proposed findings of fact and conclusions of law submitted in support of summary judgment. Plaintiffs also requested additional time to respond to the motions for summary judgment and a request for a hearing. Appdx. 5, pps. 7-10.

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8. The trial court made a ruling of dismissal on January 25, 2010. Appdx. 4, p. 8.

9. The parties continued briefing the motions to quash the request for admissions. And Appellants Mercado filed a motion for a new trial and a request for a hearing. Appdx. 3. The trial court entered a ruling denying the request for a hearing and the request for additional time to respond to the motion for summary judgment. Appdx. 4.

10. The trial court, on June 11, 2010, made a ruling denying plaintiffs' motion to alter or amend the judgments of January 25, 2010; approved findings of fact and conclusions of law and an order of dismissal from Defendant Hill; and entered its findings of fact and conclusions of law. Appdx 4.

11. Appellee Hill filed a Notice of Entry of Judgment on June 24, 2010.

12. Appellants Mercado filed a notice of appeal on July 6, 2010.

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ARGUMENT

I. Issue: The trial court erred as a matter of law and abused its discretion in denying Appellant Mercado's motion to quash the requests for admissions that were deemed admitted.

a. The trial court failed to employ the legal standard to determine whether it should use conditional discretion to decide whether to quash the admissions.

The trial court must employ a legal standard to determine whether the requested admissions may be quashed or amended. In Kotter v. Kotter, para. 9, (Ut S.Ct. 03/05/2009), the husband argued that the district court failed to recognize the legal effect of the admissions admitted and conclusively established. "The proper interpretation of a rule of procedure is a question of law, and we review the trial court's decision for correctness. See Ostler v. Buhler, 1999 UT 99, ¶ 5, 989 P.2d 1073. See generally In re E.R., 2000 UT App 143, ¶ 21, 2 P.3d 948 (" 'Admit you lose' type requests, or requests to admit legal conclusions are objectionable and not a proper basis for admission."); accord Pioneer Dodge, 702 P.2d at 100. Kotter v. Kotter, para. 18 (03/05/2009) Who was at fault is a final legal conclusion, it is improper for an admission. Raising the objection in a motion to withdraw is sufficient. Id.

The decision to permit amendment of rule 36 admissions is not entirely within the discretion of the trial court; judicial discretion is permitted only after certain preliminary conditions have been met. Langeland v. Monarch Motors, Inc., 952 P.2d 1058 (Ut 1998). The Langeland Court explains the process:

> Utah R. Civ. P. 36(b) provides that those matters deemed admitted are conclusively established as true unless the trial court, on motion, permits withdrawal or amendment of the admissions. The trial court has the discretion to permit withdrawal or amendment of

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admissions when the presentation of the merits of the action would be served and the party obtaining the admissions fails to satisfy the court that he will be prejudiced in maintaining his action. The trial court does not have discretion to unilaterally disregard the admissions. Jensen v. Pioneer Dodge Ctr., Inc., 702 P.2d 98, 100 (Utah 1985) (emphasis added) (footnotes omitted);see also Whitaker v. Nikols, 699 P.2d 685, 686-87 (Utah 1985); Brunetti v. Mascaro, 854 P.2d 555, 558 (Utah Ct. App. 1993). Id. at 1060.

...

[T]he trial court's decision to grant a rule 36(b) motion is not entirely discretionary. Instead, we review these decisions in two steps, using what might be called a "conditional" discretionary standard. In the first step, this Court review's the trial court's determinations as to whether amendment or withdrawal would serve the presentation of the merits and whether amendment or withdrawal would result in prejudice to the nonmoving party. In the second step, this Court reviews the trial court's discretion to grant or deny the motion. The trial court has discretion to deny a motion to amend, but its discretion to grant such a motion comes into play only after the preliminary requirements are satisfied. Id. at 1061.

...

In Brunetti, the court of appeals stated the determination of whether the merits of the action would be undermined unless the admissions was decided by whether the admissions are untrue. If untrue, clearly allowing amendment or withdrawal would serve as a presentation of the merits of an action. Id. at 559 n.1. The court added that the burden of showing the truth or falsity of admissions falls on the party that seeks to amend or withdraw them. Id. at 1062

...

Next, the question is just how that burden may be met. Once these matters have been admitted against a party, something more than a bare denial is required to convince the court that the admissions should be withdrawn or amended and that the merits of the matter should be argued in court. The test under rule 36(b) may therefore be articulated as follows: To show that a presentation of the merits of an action would be served by amendment or withdrawal of an admission, the party seeking amendment or withdrawal must (1) show that the

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> matters deemed admitted against it are relevant to the merits of the underlying cause of action, and (2) introduce some evidence by affidavit or otherwise of specific facts indicating that the matters deemed admitted against it are in fact untrue. Id. at 1062
>
> ...
>
> [T]he mere necessity of proving matters formerly admitted does not constitute prejudice but does admit that difficulties in proof specifically occasioned by the delay may qualify. Id. at 1062.

Here, first, the trial court had to decide whether amending the admissions would subserve presenting the merits of Appellants Mercado's case to a jury. This is a legal conclusion. This Court does not show any deference to the trial court's decision on this issue. Second, if so, then the trial court must determine whether the admissions are relevant and whether the party seeking to withdraw the admissions has met his burden of proof that the admissions are untrue. Then, if the legal conclusion is that the matter is best served if submitted to trial, then the trial court may exercise its discretion in deciding whether to allow the amendment to the admission.

The trial court has conditional discretion to determine whether to allow amendment or withdrawal of requests for admissions that have been deemed admitted by the failure to answer the requests within 30 days of service.

The trial judge clearly erred as a matter of law in failing to apply Rule 36(b) to determine whether the admissions should be withdrawn or quashed. The trial

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judge first had to determine whether the admissions are relevant. Both defendants admit the admissions are relevant. See Hill opposition to Motion to Quash; DLDS Opposition to Motion to Quash Admissions. But the trial judge goes off on a tangent and argues she cannot tell what the admissions are, and whether they are relevant. The trial court cannot sustain a finding that she did not know if the admissions were relevant when both Appellees stated they were relevant. Second, the trial judge must find the admissions are untrue. Again, the judge refuses to analyse the facts. She spent all of her time analyzing the addresses of counsel, rather than the facts submitted in the case. The trial court did not make the first required legal conclusion. This court must decide this issue de novo. First, The facts were clearly relevant. And second, they are untrue. Appellants Mercado submitted signed declarations establishing that the facts were false. They submitted insurance company statements of interviews, the police report, and excerpts of depositions and medical records. These documents were submitted with their motion. See Appdx., _____. There is no question the admitted facts were false. The trial court erred in never making this legal conclusion. This conclusion should have had a bearing in the exercise of discretion the court should have then used to determine whether to allow the admissions to be quashed.

b. Whether the trial court abused its discretion by not quashing the admissions when they were served after the discovery period had expired.

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Rule 36(b), Utah Civ.Proc., states the standard for whether a motion to quash or withdraw a request for admissions should be granted. The presence of this provision emphasizes that the trial court should resolve the cause of action on the merits. This subparagraph (b) allows protection to a party that served a request for admission, and who opposing a motion to quash an admission, if he justifiably relies on the admission in his trial preparation. See Wright, et al., Fed. Prac and Proc., Appendices, Rule 36(b), note, 1970 Amend., p. 378 (West Publish.2010).

The Utah rule reads:

> (b) Effect of admission. Any matter admitted under the rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. ...

If the trial court had fulfilled the legal scrutiny to decide whether to use its discretion to allow quashing the requests for admission, then the court had no limit on its discretion to allow withdrawal of the deemed admission of fact. The trial court grossly abused its discretion by never considering whether the deemed admission may be withdrawn. The trial court clearly had discretion to allow a late

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response to the requests for admission. Tate v. Farmland Indus., 268 F.3d 989, 998-99 (10th Cir.2001); U.S. v. Petroff-Kline, 557 F.3d 285, 293-298 (6th Cir.2009); Banks v. Office of Senate, 226 FRD 113, 118 (DDC 2005). Honest error should clearly allow a party to withdraw a deemed admission. ADM Agri-Indus. v. Harvey, 200 FRD 467 (MD Ala 2007)(the court should grant a motion to withdraw an admission when it results in a final disposition of the action from mere discovery noncompliance rather than on the merits.) It is a gross abuse of discretion if the trial court does not use the two part test stated in Rule 36(b) to rule on a motion to withdraw an admission. Perez v. Miami-Dade Co., 297 F.3d 1255, 1265 (11`th Cir. 2002). The court clearly has discretion to permit what otherwise would be an untimely answer. It does not further interests of justice to automatically determine all issues in lawsuits and enter summary judgment against a party because a dealine is missed, especially where the opposing party is not prejudiced by allowing untimely responses. Hadra v. Herman Blum Consulting Engineers, 74 FRD 113 (ND Tex.1977). A court should allow more time to respond to requests for admissions where admissions concerned ultimate liability and substantial justice would be achieved by deeming the proffered facts not admitted but rather by ordering a response. Szatanek v. McDonell Douglas Corp., 109 FRD 37, 40-41 (WDNY 1985). The court should not allow the admission of requests where they establish central facts in dispute and would be contrary to

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plaintiff's clear position and would dispose of several of plaintiffs's claims. Kosta v. Connolly, 709 F. Suppp. 592, 594 (ED Pa.1989). Inconvenience to a party is not prejudice to the party. Raiser v. Utah County, 409 F.3d 1243, 1246 (10th Cir.2005). Nor is the cost of discovery, or depositions. Withdrawal of an admissions should be permitted when doing so will aid in the presentation of the merits of the action. Dress v. Food Employers Labor Relations Ass'n, 285 F.Supp. 2d 678 (D.Md.2003). Requests for admissions have been held subject to discovery cutoff dates. Bluck v. Ansett Australia Ltd., 204 FRD 217 (DDC 2001). Requests for admissions were not allowed when served a few days before the discovery deadline. Id.

Here, it was a gross abuse of discretion to not quash the admissions. The requests for admissions were served after the discovery deadline expired. Answers were due before new discovery was even allowed. It was clearly impermissible to serve them. But the trial court , in her discretion, ignored such procedural abuses by Appellees and yet punishes Appellants Mercado where such punishment is clearly impermissible, unjust and an extreme sanction for missing a discovery deadline.

The trial court was arbitrary in its ruling and abused its discretion. First, she understood the test requires whether amendment or withdrawal would serve the presentation of the merits of the action. And Second, she did not even consider

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whether there was any prejudice to the defendants. She did not consider any prejudice in her analysis. Order, p. 16. After stating the test, the trial court went off on a tangent that was legally irrelevant, improper and erroneous as a matter of law. Judge Laycock understood she needed to analyze whether the admissions were relevant to the merits of the case. Memo Order at 13. But she does not look at the admissions nor their relevance in her analysis. Instead, she claims she cannot understand which admissions are being challenged. She also states she will not read the evidence submitted to show the admissions are false. Memo order at 13-14.

To fail to quash the admissions is an abuse of discretion because they were served in bad faith. The claimed admissions were served as a trick, a tactic to gain an advantage through gamemanship when counsel for Appellees knew they were false statements. The requests for admissions were served outside a discovery period and were served the same time as motions to compel, hiding them under voluminous mailings. The admissions asserted that the defendants were not at fault, the plaintiffs caused the accident, and the plaintiffs were not injured. The injuries arose from a rear end collision on the freeway. There are only three basic admissions. All are totally false. It was not difficult for the trial judge to understand which requests for admissions were being challenged; They all were. The trial court abused its discretion and showed her arbitrary ruling by refusing to

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evaluate the claimed admissions.

The improper gamesmanship of counsel is demonstrate by the motion for summary judgment filed by Appellee DLDS. He filed the motion for summary judgment on 10/28/09, and then filed a request to submit the motion for decision on 11/12/09. The time period included weekends of 10/31-11/1 and 11/7-11-8. Then Veterans Day was November 11, 2009. He allowed 2 business days after the motion was mailed in the first week, five days the second week, and two days the third week before he filed the request to submit. The request to submit the motion for summary judgment was submitted for a decision to the trial judge with just 10 business days after it was filed. The rules of civil procedure require at least 13 days when it was sent by mail. See Rules 3, 7, UT Civ.Proc. It was not timely submitted for a decision. It was also sent to the address where the parties already knew counsel had left. The trial judge noted mail sent to the same address for counsel for Appellants Mercado was returned to Appellee DLDS on July 29, 2009. The trial court abused its discretion by allowing the gamesmanship of counsel for Appellees to prevail instead of principles of justice.

The trial judge argues Appellants Mercado failed to make fact-based arguments which indicate that the matters deemed admitted against them are, in fact, untrue. Memo Order at 15-16. Appellants Mercado clearly stated that they were rear-ended, that they were injured, and they had no fault in causing the motor

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vehicle accident. Appellants Mercado met their burden of proof by submitting the declarations, medical records, insurance company statements obtained from Appellees. Apdx. 2, pps. 8-13 (O. Mercado Decl.), 5-27 (medical records), 22-24 (M Quispe Decl.), 5-38 (Insuranc Stmts.), 48-50 (Police Report).

Once the conditions are met, then the trial court may exercise its discretion to allow a late response to the admissions. The trial court never reached this stage because she was lost in the first two steps. It was an abuse of discretion to ignore that the requests were served in bad faith, were served during a time period when no discovery was allowed, and to ignore the improper motive of counsel for appellees in their trial tactics.

Counsel for Appellees continued to take depositions of Appellants Mercado after discovery ended on April 30, 2010. The Depositions continued by agreement between counsel. Such cooperation was not carte blanc approval of any discovery. There was no agreement on any other discovery. The fact that the appellees conducted discovery between themselves after the discovery deadline passed cannot infer that Appellants Mercado agreed to all forms of discovery without a scheduling order in place. Judge Laycock's Fact No. 8, in Ruling on Plaintiff's Motion to Alter or Amend Judgments Entered on Janaury 25, 010 Entered 01/25/2010 (filed 06/11/2010) has n o basis in inference or fact.

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The trial court did not find Appellees would be prejudiced if the admissions were quashed. Appellees cannot claim this protection because they have circumvented the trial by obtaining summary judgment based on requests for admissions that were served in bad faith. They never even got to the stage of trial preparation so they cannot claim to have been prejudiced if the trial court were to quash the admission.

The trial court abused its discretion in failing to quash the admissions as demonstrated by the above facts.

II. Whether trial court erred as a matter of law in denying the motion for new trial.

A motion for new trial is appropriate after a motion for summary judgment. Moon Lake Elec. Ass'n v. Ultrasystems W. Constructors, Inc. 767 P.2d 125 (UtApp. 1988). Summary Judgment is not generally appropriate to resolve issues of negligence. Preston v. Lamb, 20 Ut.2d 260, 436 P.2d 1021 (1968). Summary judgment should not be granted unless the jury could not reasonably find defendant's conduct to be negligent. Wycales v. Guardian Title, 780 P.2d 821 (Ut.App 1989), cert denied, 789 P.2d 331 (Ut 1990). The court cannot enter summary judgment unless it addresses any pending Rule 56(f) motion. Energy Management Services v. Shaw, 2005 UT App 90, 110 P.3d 158.

New trial should be granted if there is substantial evidence showing support in favor of the party moving for a new trial. Creeling v. Thomas, 122 Ut. 122, 247

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P.2d 264 (1952); Wellman v. Noble, infra. The trial court should use its discretion to correct findings in error or where there is substantial doubt that issues were fairly tried. Page v. Utah Home Fire Ins. Co., 15 Ut.2d 257, 391 P.2d 290 (1964). Likewise, a new trial is appropriate if the amount of damages awarded cannot be justified from the evidence, and where the damages are a clear result of passion. Meyer v. Bartholomew, 690 P.2dc 558 (Ut.1984). The trial court decision in denying a motion for a new trial after summary judgment is reviewed for an abuse of discretion. Crelling v. Thomas, 122 Ut 122, 247 P.2d 264 (1952).

The court should exercise discretion to grant these motions if it is the interest of justice between the parties. Creeling v. Thomas, 122 Ut. 122, 247 P.2d 264 (1952).

The trial court abused its discretion by denying the motion for a new trial. It clearly understood that the issues were not fairly tried. The trial court allowed the issue of negligence, fault, damages all to be decided by requests for admissions deemed admitted. There was no fair process in such admissions. The judge refused to look at what was really fair. This was an abuse of discretion. Likewise, an award of no damages for a rearend collision cannot be justified from any evidence. It was an abuse of discretion to deny the motion for a new trial.

III. Whether the Trial Court erred as a matter of law in entering summary judgment in favor of defendants.

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The party against whom judgment is granted gets all facts presented and all inferences considered in the light most favorable to him. The appellate court does not defer to the trial court's legal conclusions because they are a matter of law. Barbers v. Farmers Ins. Exchange, 751 P.3d 248 (Ut.App.1988). The appellate court reviews the conclusions for correctness. Bonham v. Morgan, 788 P.2d 497 (Ut. 1989); Schurtz v. BMW, 814 P.2d 1108 (Ut 1991). The Court should only consider facts in dispute in reviewing summary judgment. Sorenson v. Beers, 585 P.2d 458 (UT 1978). If there is any genuine issue concerning a material fact then summary judgment is inappropriate. Young v. Felornia, 121 Ut 6465, 244 P.2d 862 (1954).

The admissions by themselves do not establish that appellees had no fault. Such a decision of comparative fault includes legal issues that are a matter of law. The lawsuit put comparative fault at issue. The genuine issue should have precluded summary judgment.

IV. Whether the trial court entered findings of fact that are not supported by substantial evidence and are erroneous.

All facts should be considered in the light most favorable to the party against whom judgment was granted. Barbers v. Farmers Ins. Exchange, 751 P.2d 248 (Ut.App.1988). The evidence must be viewed in the light most favorable to Plaintiffs and the findings should be reversed if any evidence may support a finding in their favor. Id.

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If the admissions had been quashed summary judgment could not have been entered because there was no evidence presented by Appellees that Appellants Mercado were at fault and were not injured. Likewise, the findings and conclusions entered by the trial court would have no evidence at all to support them. It was an abuse of discretion to enter such findings and conclusions without any factual basis other than the deemed admissions.

In conclusion, the Court should reverse the trial court and remand this matter for trial on the merits. The trial court erred as a matter of law in denying the motion of Appellants Mercado to quash the admissions. The admissions should be quashed because it would subserve presenting the matter on the merits. The admissions were clearly relevant to the cause of action. Appellants Mercado met their burden of proof that the admissions were untrue with their declarations, excerpts from the depositions, the police report, medical reports and insurance company statements from the Appellees. The trial court totally failed to analyze whether the legal standard required that it exercise its discretion to determine whether to quash the admissions.

Then, the trial court abused its discretion in denying the motion to quash the admissions. The admissions were not fairly presented. The admissions were served in bad faith. There was no discovery order in place that allowed their

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service on Appellants Mercado. The admissions sought final legal conclusions and were not proper. The admissions were untrue. It was an abuse of discretion to deny the motion to quash.

Likewise, there was no evidence to support summary judgment, findings of fact and conclusions of law, the denial of a new trial. All erroneous rulings arose from the abuse of discretion of the trial court.

Wherefore, Appellants Mercado pray that the decision of the trial court be reversed and the matter remanded for trial.

Respectfully,

S. Austin Johnson
Attorney for Appellants Mercado

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S. Austin Johnson, USB #5179
359 East 1200 South
Orem, UT 84097
(801)426-7900

Attorney for Plaintiff Oscar Mercado and Maricella Quispe

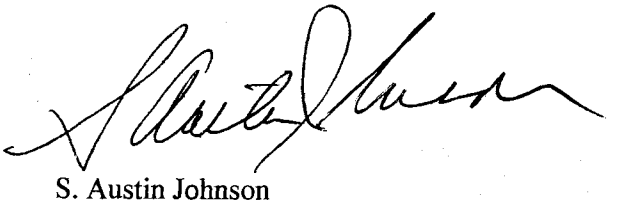
IN THE UTAH COURT OF APPEALS

OSCAR MERCADO, MARICELLA QUISPE,	)	
Appellants,	)	**Certificate of Service**
v.	)	Appeal Case No. 20100627
LINDSEY HILL, DIAMOND LINE DELIVERY SYSTEM	)	District Court. No. 070403371
Appellees.	)	

I HEREBY CERTIFY that on this 5th day of April, 2011, a copy of Appellants Opening Brief were mailed first class, postage prepaid from Orem, to the following:

Terry Plant
Jeremy Neeley
PLANT, CHRISTENSEN & KANELL
136 E South Temple Ste 1700
Salt Lake City, UT 84111
Attorney for Defendant-Appellee
Diamond Line Delivery

Richard K. Glauser
Trevor Bradford
SMITH & GLAUSER
1218 E 7800 S Ste 300
Sandy, UT 84094
Attorney for Defendant- Appellee
Lindsey Hill



S. Austin Johnson
Counsel for Plaintiff-Appellants.

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APPENDIX 1

Request for Admission

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S. Austin Johnson, Esq. (USB# 5179)
JOHNSON LAW ASSOCIATES
P.O.Box 970880
Orem, UT 84097-0880
Tel: (801) 426-7900

Attorney for Plaintiff Oscar Mercado and Maricela Quispe

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

OSCAR MERCADO and MARICELA QUISPE,)	Plaintiffs RESPONSE to Requests for Admissions from Defendant Hill
Plaintiffs,)	Case No. 070403371
VS.)	
LINDSEY HILL and DIAMOND LINE DELIVERY SYSTEM,,)	Judge Hon. Claudia Laycock
Defendants.	

Come now Plaintiffs, by and through counsel, and hereby jointly respond to the Requests for Admissions served by Defendant Lindsey Hill.

First, Plaintiffs object to the requests for admissions. They were served when they were not authorized by the scheduling order. Fact discovery terminated on April 30, 2009. The requests for admissions were served on September 4, 2009. There was no order or agreement in place at the time that authorized service of the requests for admissions.

Second, the requests for admissions were sent to the wrong address for counsel for plaintiffs. He moved from the University Parkway address on February 1, 2009.

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Counsel for defendants knew of his new address because the continued deposition of Maricela Quispe was scheduled to take place in his new office.

Third, Plaintiffs specifically deny each and every tendered request for admission. Their denials are supported by their declarations, deposition testimony, the accident report, and statements taken by the insurance adjuster on the day of the accident. These documents are attached to the Plaintiffs' Reply to Defendant Diamond Line Delivery Systems Memorandum in Opposition to Plaintiffs' Motion to Quash or Withdraw Admissions, filed on February 1, 2010. Each requested admission is denied as follows:

Request No. 1. Admit that Defendant Hill was not at fault for the accident that is the subject matter of this lawsuit.

Answer: Denied. Defendant Hill was at fault in causing the accident because its driver left its tractor and trailer in the middle of the lane of traffic on Interstate 15 because the driver ran out of gas. He did not turn on emergency flashers or give any warning of the disabled vehicle. See O. Mercado Decl., para. 3-4; M.Quispe Decl., para. 3.

Request No. 2. Admit that Defendant Hill is not responsible for the accident that is the subject matter of this lawsuit.

Answer: Denied. The response to Request No. 1 is incorporated herein.

Request No. 3. Admit that Defendant Diamond Line Delivery System is at fault for the accident that is the subject matter of this lawsuit.

Answer: Admitted. Defendant DLDS is clearly at fault because the driver ran out of gas on the freeway, left his vehicle in the lane of traffic, and failed to warn traffic of the hazard with emergency flashing lights. But the driver is only partially at fault because

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Defendant Hill was also at fault by hitting Plaintiffs in the rear of their vehicle. See O. Mercado Decl., para.; M. Quispe Decl.,para. 3-4.

Request No. 4. Admit that Defendant Diamond Line Delivery System is primarily at fault for the accident that is the subject matter of this lawsuit.

Answer: Denied. Both defendants were primarily at fault. If Defendant DLDS had not run out of gas and left the vehicle in the middle of the lane of traffic on the freeway as the day was getting dark then the accident would not have happened.

Request No. 5. Admit that Oscar Mercado was at fault for the accident at issue in this lawsuit.

Answer: Denied. Plaintiff Oscar did not have any fault in causing the accident. He avoided any impact with the vehicle in front of him. He was hit from behind when he stopped his vehicle to avoid the collision. He had no fault. See O. Mercado, Decl., para. 3-4; M. Quispe Decl., para. 3.

Request No. 6. Admit that you were not significantly injured in the accident at issue in this lawsuit.

Answer: Denied. Both Plaintiffs suffered significant, serious and ongoing injuries. See O. Mercado Decl., para. 5; M.Quispe Decl., para. 4.

Respectfully submitted,

S. Austin Johnson
Counsel for Plaintiffs

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\TERRY M. PLANT, #2610
PLANT, CHRISTENSEN & KANELL
Attorneys for Defendant Diamond Line Delivery System
136 East South Temple, Suite 1700
Salt Lake City, Utah 84111
Telephone: (801) 363-7611

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

OSCAR MERCADO, MARICELA QUISPE, Plaintiffs, v. LINDSEY HILL, DIAMOND LINE DELIVERY SYSTEM, Defendants.	**DEFENDANT DIAMOND LINE DELIVERY SYSTEM'S FIRST SET OF REQUESTS FOR ADMISSION TO PLAINTIFF OSCAR MERCADO** Civil No. 070403371 Judge Claudia Laycock

COMES NOW the Defendant, Diamond Line Delivery System, (hereinafter "DLDS") by and through its counsel of record, in accordance with the provisions of Rules 26, 36, and 37 of the Utah Rules of Civil Procedure, submits herewith these Requests for Admissions to Oscar Mercado. These requests are to be responded to by Oscar Mercado within thirty (30) days of the date of service at the office of Plant, Christensen & Kanell, 136 East South Temple, Suite 1700, Salt Lake City, Utah 84111. If objection is made to any request, or any part thereof, you are hereby requested to set forth with particularity the specific objection as to each part.

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NOTICE

You are hereby placed on actual notice that, pursuant to Rule 36, "matters shall be deemed admitted unless said request is responded to within 30 days after service of the request." Utah R. Civ. P. 36(a)(1)(2009).

REQUESTS FOR ADMISSION

REQUEST NO. 1: Admit that Defendant DLDS was not at fault for the accident that is the subject matter of this lawsuit.

REQUEST NO. 2: Admit that Defendant DLDS is not responsible for the accident that is the subject matter of this lawsuit.

REQUEST NO. 3: Admit that Defendant Hill is at fault for the accident that is the subject matter of this lawsuit.

REQUEST NO. 4: Admit that Defendant Hill is primarily at fault for the accident that is the subject matter of this lawsuit.

REQUEST NO. 5: Admit that Oscar Mercado was at fault for the accident at issue in this lawsuit.

REQUEST NO. 6: Admit that you were not significantly injured in the accident at issue in this lawsuit.

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DATED this 4th day of September, 2009.

PLANT, CHRISTENSEN & KANELL

TERRY M. PLANT
Attorneys for Diamond Line Delivery System

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IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

OSCAR MERCADO, MARICELA QUISPE, Plaintiffs, v. LINDSEY HILL, DIAMOND LINE DELIVERY SYSTEM, Defendants.	**DEFENDANT DIAMOND LINE DELIVERY SYSTEM'S FIRST SET OF REQUESTS FOR ADMISSION TO PLAINTIFF MARICELA QUISPE** Civil No. 070403371 Judge Claudia Laycock

COMES NOW the Defendant, Diamond Line Delivery System, (hereinafter "DLDS") by and through its counsel of record, in accordance with the provisions of Rules 26, 36, and 37 of the Utah Rules of Civil Procedure, submits herewith these Requests for Admissions to Maricela Quispe. These requests are to be responded to by Maricela Quispe within thirty (30) days of the date of service at the office of Plant, Christensen & Kanell, 136 East South Temple, Suite 1700, Salt Lake City, Utah 84111. If objection is made to any request, or any part thereof, you are hereby requested to set forth with particularity the specific objection as to each part.

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REQUESTS FOR ADMISSION

REQUEST NO. 1: Admit that Defendant DLDS was not at fault for the accident that is the subject matter of this lawsuit.

REQUEST NO. 2: Admit that Defendant DLDS is not responsible for the accident that is the subject matter of this lawsuit.

REQUEST NO. 3: Admit that Defendant Hill is at fault for the accident that is the subject matter of this lawsuit.

REQUEST NO. 4: Admit that Defendant Hill is primarily at fault for the accident that is the subject matter of this lawsuit.

REQUEST NO. 5: Admit that Oscar Mercado was at fault for the accident at issue in this lawsuit.

REQUEST NO. 6: Admit that you were not significantly injured in the accident at issue in this lawsuit.

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DATED this 4th day of September, 2009.

PLANT, CHRISTENSEN & KANELL

TERRY M. PLANT
Attorneys for Diamond Line Delivery System

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APPENDIX 2

Plaintiff's Relevant Responses and Submissions to Motions

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Tel: (801) 426-7900

Attorney for Plaintiff Oscar Mercado and Maricela Quispe

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

OSCAR MERCADO and MARICELA QUISPE, Plaintiffs, VS. LINDSEY HILL and DIAMOND LINE DELIVERY SYSTEM,, Defendants.	Request to Submit Motion for New Trial Case No. 070403371 Judge Hon. Claudia Laycock

---

Come now Plaintiffs, by and through counsel, and hereby jointly submit their motion for a new trial. Plaintiffs filed their motion after this court entered a judgment in favor of defendants. Defendant Diamond Line Delivery System filed an answer. Plaintiffs motion for permission to amend the requests for admissions has also been previously submitted to the court for decision. These matters are now ready for the Court to consider and decide.

Respectfully submitted,

S. Austin Johnson
Attorney for Plaintiffs

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Certificate of Mailing

I certify I sent a copy of this document by U.S. mail, from Orem, UT, on this 15th day of April, 2010, to:

Richard K. Glauser
Trevor A. Bradford
1218 East 7800 South, Suite 300
Sandy, UT 84094

Terry Plant
136 East South Temple, Suite 1700
Salt Lake City, UT 84111

_____
Attorney

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(2)

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Tel: (801) 426-7900

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Attorney for Plaintiff Oscar Mercado and Maricela Quispe

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

OSCAR MERCADO and MARICELA QUISPE, Plaintiffs, VS. LINDSEY HILL and DIAMOND LINE DELIVERY SYSTEM,, Defendants.	)	Plaintiffs Motion to Alter or Amend Judgments entered on January 25, 2010 Case No. 070403371 Judge Hon. Claudia Laycock

Come now Plaintiffs, by and through counsel, and hereby move, pursuant to Rule 59(e), Ut.Civ.Proc., to alter or amend the judgment in this matter. This motion challenges the summary judgment and findings of fact entered in favor of Defendant Diamond Line Delivery System and Defendant Hill. This Court entered judgment on January 25, 2010. This motion is timely filed 10 days after the judgment was entered. Id.

This Court should amend its findings of fact and conclusions of law when they are clearly erroneous. Rule 52(a), Ut.Civ.Proc. The motion to amend the findings of fact may be made by a motion for a new trial pursuant to Rule 59. Id. This motion may

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challenge the sufficiency of the evidence to support the findings, regardless of whether the party raising the question has made in the district court an objection to the findings. Id., (b).

The motion to alter or amend or amend the judgment may be granted where irregularities in the proceedings of the court,or [by] the adverse party prevented a fair trial; where there is insufficiency of the evidence to justify the decision; or where inadequate damages were given under the influence of prejudice. Rule 59(a)(1),(5) and (6), Ut.Civ.Proc.. This motion for a new trial after entry of summary judgment is procedurally correct and available. Moon Lake Elec Ass'n v. Ultrasystems W. Constructors, Inc., 767 P.2d 125 (Utah Ct.App.1988); Interstate Land Corp. v. Patterson, 797 P.2d 1101 (Ut.Ct.App.1990). Even a motion objecting to proposed findings of fact and order may be treated as a motion for a new trial under Rule 52(b) or 59. Regan v. Blount, 1999 UT App 154, 978 P.2d 1051.

Plaintiffs filed on December 24, 2009, objections to the rulings on the defendants' motions for summary judgment and motions to quash the requests for admissions being deemed against them by operation of law. Plaintiffs also objected to the proposed findings of fact and proposed order granting summary judgment. They requested additional time to respond to summary judgment because discovery had not been completed. Defendants, on January 13 and 19, 2010, filed opposition to plaintiffs motions to quash the admissions, and to the objections to the proposed findings and order. Then, on February 4, 2010, Plaintiffs filed a reply to the defendants' opposition to their motion. Plaintiffs also filed motions to quash or amend the admissions. These motions by plaintiffs amount to a motion to amend or alter the judgment. This motion,

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together with the motions previously filed by Plaintiffs in opposition to the proposed findings and order, and moving to quash the admissions, makes absolutely clear that Plaintiffs have moved to alter the judgment and the Court should deny the motion for summary judgment.

The judgment finds that the Plaintiffs were at fault in causing the motor vehicle accident, the plaintiffs suffered no injury and that the two defendants had no fault. These findings are absolutely false. See the Declaration of Oscar Mercado and Maricela Quispe, dated Janaury 28, 2010, and attached hereto. This motion to alter the judgment and deny the motions for summary judgment should be granted because it can be reasonably concluded that there is insufficient evidence to support the judgment. See O. Mercado Decl., para. 3, 4; M. Quispe Decl., para. 3. The declarations from plaintiffs, the pages of their depositions, the statements taken by the insurance company adjusters of the drivers on the day of the accident, which were attached to their replies to the defendants opposition to the motions to quash the admissions, all show that these findings in the summary judgment were absolutely false. See Exhibit B, Plaintiffs Repl[ies] to defendants opposition to motions to quash admissions, filed February 4, 2010. These documents and the attached declarations show Plaintiffs did not have fault in causing the accidents, they were seriously injured, and the defendants were at fault. It was bad faith to argue contrary to these facts. These reasons justify altering or amending the judgment entered on Juanuary 25, 2010, and denying summary judgment.

Irregularities in the court proceedings and conducted by the adverse parties have prevented a fair trial and justify amending the judgment and denying summary judgment. The summary judgment was based solely upon the requests for admissions. No other

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evidence was presented by defendants in support of their motions. The defendants ignored all the facts developed during the partial discovery that has been completed and moved for summary judgment based only on the requests for admissions. The requests for admissions were served on plaintiffs during a time period when they were not allowed by a discovery order. The scheduling order terminated discovery on April 30, 2009. The requests for admissions were served on or about September 2 and 8, 2009. The requests were improperly served. A new scheduling order was entered on October 1, 2009, but the requests for admissions were not served again after that date. Instead, defendants filed motions for summary judgment on October 23 and 28, 2009. This irregularity of serving discovery requests that were not allowed clearly prevented a fair judgment. They were served when counsel for plaintiffs had to move his office. He had to move on June 15, October 1, and again on December 7, 2009. He failed to keep up with filing changes of address because he did not get a stable office established. Defendant Diamond Line Delivery Systems sent mail to an address for counsel where he had been one year ago before all of the moves occurred. But the same counsel was able to set, cancel and attend depositions with counsel for plaintiffs at the new addresses. These problems of counsel for plaintiffs should not be imputed to his clients and cause them to lose a meritorious case.

Plaintiffs requests for extensions of time to respond to summary judgment were made because depositions have not been completed and plaintiffs have not gotten copies of the transcripts. Also, Plaintiffs were out of the country from mid-November until early January 2010. See O. Mercado Decl., para. 6; M. Quispe Decl., para. 6. Depositions of the drivers were postponed by counsel for defendants. The plaintiffs have provided all

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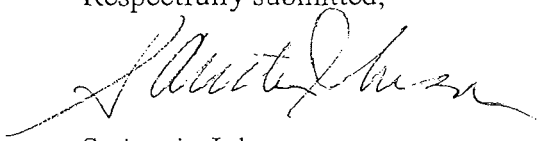
medical records, answered interrogatories, and submitted to extensive depositions. Id., paras. 7. The evidence is insufficient to support the judgment entered by the Court. Additionally, plaintiffs should have additional time to complete discovery and show how false these alleged facts really are. Failure to allow this discovery to be completed, the fact that defendants have ignored the facts and prevented falsehoods to the Court is an irregularity caused by adverse counsel and clearly makes the judgment unfair.

Counsel for Plaintiffs clearly objected to the extended discovery of the request for admissions. These objections were filed on December 24, 2009, and January 8, 2010. These proposed findings should not have been adopted by the Court as part of its judgment.

Lastly, the judgment of the Court denied plaintiffs any damages. This judgment is erroneous and should be corrected. Plaintiffs suffered serious injuries. See M. Quispe Decl., para. 4 and O. Mercado Decl., para. 5., attached hereto. When damages are clearly inadequate the judgment should be amended, altered and corrected to deny summary judgment.

Wherefore, counsel for plaintiffs prays that the Court consider all of the recent filing by plaintiffs since December 24, 2009, and find that the order granting summary judgment is not supported by the evidence, it is a result of irregularities in the proceedings, and clearly awards inadequate damages. The judgment entered on January 25, 2010, should be reversed and this matter allowed to go forward to trial.

Respectfully submitted,



S. Austin Johnson
Counsel for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify I mailed from Orem, UT, a copy of this document on this 8th day of February, 2010, to Terry Plant, Attorney, at 136 East South Temple, Suite 1700, Salt Lake City, UT 84111; and to Trevor A. Bradford, Esq., 1218 East 7800 South, Suite 300, Sandy, UT 84094.

S. Austin Johnson

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State of Utah)

) ss. Declaration of Oscar Mercado

County of Utah)

I, Oscar Mercado, being first under oath, promise to tell the truth under penalty of perjury under the laws of the State of Utah, and state:

1. I am a resident of Orem, UT.

2. I was the driver in the 1986 Toyota Pickup 4X4 on Febr 28, 2007, on I-15, near Lehi at about 7 to 8 p.m., when we were involved in an accident.

3. I did not have any fault in causing the motor vehicle accident between Lindsey Hill and myself. I saw a vehicle stopped in our lane of travel. Its rear lights were on like it was traveling forward. I noticed the vehicle was not going forward and I was able to stop suddenly and avoid any impact with the vehicle that was stopped in our lane in front of us. Lindsey Hill was the driver who hit me from behind. She hit me immediately when I was coming to a full stop. I did not hit the vehicle that was stopped in front of me. She was following too close, traveling too fast, or not paying attention so she hit me in the back of my car when I came to a stop.

4. When I was in the hospital with my wife the police officer who investigated the accident called me. He wanted my insurance information. He told me the vehicle in front of me caused the accident. The driver ran out of gas. He left the vehicle in the lane of travel. He did not move it off the side of the road. He abandoned the vehicle and did not turn on emergency flashers or warning lights. The vehicle was owned and driven by Defendant Diamond Line Deliver Systems.

5. I had terrible pain at the time of the accident. I have been diagnosed with a fractured pelvic bone, fractured coccyx, herniated disc at L4-5, and strain of my back. Dr. Richie, an orthopedic surgeon was considering surgery. I could not work for six months after the accident. I stopped working very much overtime. I can only work at a level 2 when before the accident I was working at a level 5. I continue to have some pain.

6. I went to Bolivia from December 3 to January 2, 2010.

7. The attorneys for the defendants took my deposition on two separate days. I was about 8 hours and then another four hours. I have over 66 pages from the second deposition. I did not see the transcript from the first deposition. I presented all of my documents in support of my claim. I also completed interrogatory answers to explain

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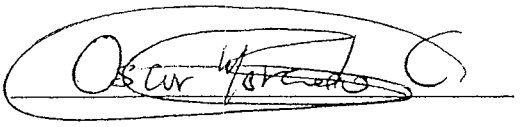
how the accident happened and my injuries. I gave the defendants all of my medical records. My medical records show my injuries are real. All of my effort in providing this information has been to show the defendants that they were at fault in causing the accident; that I had no fault; and that my injuries are real.

I declare the above facts to be true and correct and I do so under penalty of perjury under the laws of the State of Utah on this 28 day of January, 2010.



Oscar Mercado

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_Ortho Prog Note

Patient: OSCAR MERCADO EMRN: 365217
DOB: Jun 29, 1964 5095611

Encounter Date: Jun 8 2007 10:00AM

INITIAL PATIENT EVALUATION

PATIENT: Oscar Mercado

DATE: 05/08/2007

He presents via his primary care physician for evaluation of his back.

PAIN: He was involved in a motor vehicle accident February 28, 2007. For me he describes a lower lumbar ache as well as rectal pain. initially the rectal pain was quite severe. he describes it initially as a very sharp nail type pain. now it is more of a defuse ache.

RADICULOPATHY: None.

TREATMENT: Apparently he had what sounds like a GI swallow, a good portion of his stomach pan and rectal pain is diminished, but not completely resolved.

SOCIAL HISTORY: He is married, he works at Nestles. He continue to work at this time.

PHYSICAL EXAMINATION: Pleasant gentleman. He looks like he has Bell's Palsy. I did not question him about that, but he ambulates under his own power and he has no focal deficits. He has minimal pan to his coccyx with palpation.

IMAGING: X-rays of the lumbar spine a sacrum taken in the office today reveals, AP pelvis x-ray reveals what appears to be a _____ pubis right sided fracture, minimally displaced, but nevertheless present. Coccyx is angled anteriorly, no specific fractures noted, but the anterior angulation gives concern.

Two views of the lumbar spine shows what appears to be an L5 pars fracture, no conclusive, but certainly suspicious. He does have an anterior osteophyte superior aspect of L5.

IMPRESSION:
1. Pubic fracture.
2. Coccydynia.
3. Low back pain, possible pars fracture.

RECOMMENDATIONS:
1. CT lumber spine.
2. Continue working I did not change that at all.
3. No medication was requested or given today.
4. We will follow up with CT of the lumbar spine.

Joseph L. Richey, M.D.

Received for:Joseph L Richey M.D. Jun 11 2007 7:03PM Mountain Standard Time

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17

_Ortho Prog Note

Patient:	OSCAR MERCADO	EMRN:	365217
DOB:	Jun 29, 1964		5174755

Encounter Date: Jun 26 2007 3:30PM

S: Oscar presents today for first perusal of his lumbar MRI. The lumbar MRI shows osteoarthritis changes at L3-4, L4-5 and L5/S1 without nerve root compromise.

His chief complaint continues to be buttocks pain as well as pelvic pain. he even indicates that it is difficult to have intimate relations with his wife.

Socially he has been a professional soccer player in Peru. He has even coached and organized soccer teams. He has not been able to do that this year because of his car accident and subsequent pain.

O: Alert and oriented, no focal motor deficit. He seems appropriate.

Imaging: MRI as above. I do not see a new problem related to his spine that would have necessarily occurred in the car accident.

We do know by plain films that he has a pelvic fracture and also by plain films displaced coccygeal injury.

I: Coccydynia, pelvic fracture.

R: 1. He is approximately four months out form his injury. I recognize that he has a pelvic fracture and a coccydynia issue, but would not necessarily operate this soon. For his coccyx I would suggest waiting another four months. If coccydynia continues to be an issue then a coccygectomy would be recommended. With respect to his pelvic fracture, like I said he is only four months out. This should heal, this should improve, and it should not be a long term problem. I have explained this to Oscar and we will follow up in four months for review of these two issues.

Received for:Joseph L Richey M.D. Jun 28 2007 1:04PM Mountain Standard Time

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_Ortho Prog Note

Patient:	OSCAR MERCADO	EMRN:	365217
DOB:	Jun 29, 1964		5174759

Encounter Date: Jun 26 2007 3:30PM

ADDENDUM

He did explain to me that he was driving down the freeway when someone stopped in front of him. I think five cars ahead of him stopped, every body else seemed to be stopping, but unfortunately the person in the back and basically hit every body.

Received for:Joseph L Richey M.D. Jun 28 2007 1:06PM Mountain Standard Time

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17.

State of Utah)

) ss. Declaration of Maricela Quispe

County of Utah)

I, Maricela Quispe, declare the following to be true and correct under penalty of perjury under the laws of the State of Utah;

1. I am a resident of Orem, UT;

2, I was a passenger in the 1986 Toyota Pickup 4X4 driven by my husband Oscar Mercado on Febr 28, 2007, on I-15, near Lehi at about 7 to 8 p.m., when we were involved in an accident.

3. My husband did not have any fault in causing the motor vehicle accident between Lindsey Hill and myself. I saw a vehicle stopped in our lane of travel. Its rear lights were on like it was traveling forward. My husband noticed the vehicle was not going forward and he was able to stop suddenly and avoid any impact with the vehicle that was stopped in our lane in front of us. Lindsey Hill was the driver who hit me from behind.

4. I had terrible pain where the seat belt came across my chest. I suffered much pain in the neck, my chest, and my head and my back. I still suffer so much pain that it is uncomfortable to work. I have not worked since November 2009. When I use my arms for more than one hour I get too much pain in my back and I cannot keep working. When I sit for very long and then get up I have much pain in my heels. My neck gets too painful even now when I keep it in one position for too long. The doctors say I damaged my nerve roots. In fact, I had so much chest pain and back pain in November 2009, that I had to go to the hospital. The doctors say my damage to my nerve roots & joints in bones make pain similar to a heart attack.

6. I went to Bolivia from November 14 to January 2, 2010.

7. The attorneys for the defendants took my deposition for about three hours. We continued the deposition because I was having too much pain. I scheduled in August 2009 to take my deposition. But then the attorneys for the defendants cancelled it. I have over 77 pages from the deposition. I presented all of my documents in support of my claim. I also completed interrogatory answers to explain how the accident happened and my injuries. I gave the defendants all of my medical records. I was never shown the pages from the first deposition. My medical records show my injuries are real.

I declare the above facts to be true and correct and I do so under penalty of perjury under the laws of the State of Utah on this 28 day of January, 2010.

X _____

Maricela Quispe

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Machine-generated OCR, may contain errors.

S. Austin Johnson, Esq. (USB# 5179)
JOHNSON LAW ASSOCIATES
P.O.Box 970880
Orem, UT 84097-0880
Tel: (801) 426-7900

Attorney for Plaintiff Oscar Mercado and Maricela Quispe

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

OSCAR MERCADO and MARICELA QUISPE,)	Request to Submit Motion to Quash or Withdraw Admissions
Plaintiffs,)	Case No. 070403371
VS.)	
LINDSEY HILL and DIAMOND LINE DELIVERY SYSTEM,,)	Judge Hon. Claudia Laycock
Defendants.)	

Come now Plaintiffs, by and through counsel, and hereby jointly submit their motion to quash or withdraw admissions in this matter. The motion was filed on December 24, 2009. The Defendants opposed the motion on January 11 and 14, 2010. Plaintiffs filed their reply to the opposition, with their declaration and response to the requests for admissions on February 3, 2010. The matter is now ready for the Court to consider and decide.

Respectfully submitted,

S. Austin Johnson

Attorney for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify I mailed a copy of this document on this 3rd day of February, 2010, from Orem, UT, to the following:

Terry Plant, Esq.
Attorney
136 East South Temple, Suite 1700
Salt Lake City, UT 84111

Trevor Bradford, Esq.
1218 East 7800 South
Sandy, UT 84094

Secretary for S. Austin Johnson

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S. Austin Johnson, Esq. (USB# 5179)
JOHNSON LAW ASSOCIATES
P.O.Box 970880
Orem, UT 84097-0880
Tel: (801) 426-7900

Attorney for Plaintiff Oscar Mercado and Maricela Quispe

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

OSCAR MERCADO and MARICELA QUISPE,	)	Plaintiffs Reply to Defendant Diamond Line Delivery Systems Memorandum in Opposition to Plaintiffs' Motion to Quash or Withdraw Admissions
Plaintiffs,	)	Case No. 070403371
VS.	)	
LINDSEY HILL and DIAMOND LINE DELIVERY SYSTEM,,	)	Judge Hon. Claudia Laycock
Defendants.		

Come now Plaintiffs, by and through counsel, and hereby reply to the Opposition by Diamond Line Delivery System to Plaintiffs Motion to Quash or Withdraw Admissions.

Defendant DLDS recites generally in facts 1-14, that Plaintiffs' counsel had moved and the defendants knew about the move because correspondence was returned to it. These facts are generally correct. Although fact no 3 is denied because counsel for plaintiffs recalls speaking with the secretaries of counsel for defendants and scheduling

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dates to continue the depositions of plaintiffs. Those depositions were commenced but never completed. Counsel for Plaintiffs, on several occasions, agreed with the offices of counsel for defendants on dates to complete those depositions. Locations were always discussed for each of those continuances. Counsel for defendants cancelled those continued depositions each time they came up.

The undersigned disagrees with alleged facts nos. 15 and 16. Those alleged facts read:

> 15. Although discovery was scheduled to expire on April 30, 2009, parties to the action continued to conduct discovery and depositions of fact witnesses through June of 2009.
>
> **16.** No parties objected to this extended discovery.

The only discovery that continued before a new scheduling order was entered was completing the depositions of plaintiffs. The depositions were begun within the period of authorized discovery. See Exhibit A, Notice of Depositions of Plaintiffs, served Dec. 17, 2008. Oscar Mercado testified for about 8 hours in his first deposition in April 2009. His wife sat patiently in the lobby because she was also scheduled. But counsel for Defendant Hill did not complete this deposition. All counsel agreed to reconvene the depositions as soon as possible. The depositions reconvened on May 4, 2009. We tried to meet the discovery deadline but the soonest date when all persons were available was May 4, 2009. The undersigned, on behalf of Plaintiffs, continued to agree to proposed dates so defendants could complete these depositions. We also agreed to try to depose the defendants. But all subsequent dates kept being cancelled by counsel for defendants. See Exhibit A, Attached hereto, including Declaration of O. Mercado, dated 1/30/10; Declaration of M. Quispe, dated 1/30/10; Garcia & Love Ltr., dated 6/30/09 and

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7/14/09(depositions taken on April 9 and May 4, 2009). All parties made agreements to complete the depositions that were begun. We tried to agree on each specific deposition. There was no discovery order in place. There was no general agreement that whatever discovery the defendants could dream up could be undertaken. Counsel for defendants never hinted that they were going to send requests for admissions. Counsel for defendants could only engage in discovery if it was authorized by the scheduling order, or if they had specific agreements with the undersigned. The requests for admissions were served in August and September, 2009, without any agreement between the parties to authorize the service, and without an order that allowed the discovery.

Counsel for Plaintiffs clearly objected to the extended discovery of the request for admissions. These objections were filed on December 24, 2009, and January 8, 2010.

Next, counsel for DLDS argues Plaintiffs' motion to withdraw or quash the admissions, and the objections to the proposed findings of fact, conclusions of law, and proposed order, should be evaluated under a Rule 59(e) motion to alter or amend judgment, or a Rule 60(b) motion for relief from judgment. But no judgment has been entered in this matter. The Court issued a ruling. The ruling has not been made into a judgment. There is a difference between a pre-judgment ruling and a final judgment. See Gillett v. Price, 2006 UT 24. Counsel for Plaintiffs has raised his objections and motion to avoid the unjust result that would come from entering a judgment based on the initial ruling of the Court. The ruling, which found plaintiffs were at fault and suffered no injuries, would clearly result in inadequate damages. The major factor in the ruling against plaintiffs was service of requests for admissions when they were not authorized, and service to an erroneous address. Also, one or both plaintiffs were out of the country

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from November 14, until January 2, 2010. See M. Quispe Decl., para. 6.; O. Mercado Decl., para. __. These irregularities in the clearly resulted in a fair trial for plaintiffs.

The declarations from plaintiffs, the pages of their depositions, the statements taken by the insurance company adjusters of the drivers on the day of the accident, all show that the requests for admissions were absolutely false. See Exhibit B, attached hereto. Plaintiffs did not have fault in causing the accidents, they were seriously injured, and the defendants were at fault. It was bad faith to argue contrary to these facts. These reasons justify relief from the pre-judgment ruling.

The motion for summary judgment is based solely upon the requests for admissions. No other evidence was presented by defendant in support of her motion. The defendant ignored all the facts developed during authorized discovery and moved for summary judgment based on unauthorized discovery, and with assertions of false facts. The motion to quash or withdraw admissions should be granted. Summary judgment cannot be entered in light of this record.

Wherefore, counsel for plaintiffs prays that the alleged admissions of fact be withdrawn, that the proposed findings of fact and conclusions of law be denied, and that summary judgment be denied.

Respectfully submitted,

S. Austin Johnson
Counsel for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify I mailed a copy of this document on this 3rd day of February, 2010, from Orem, UT, to the following:

Terry Plant, Esq.
Attorney
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Trevor Bradford, Esq.
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Sandy, UT 84094

Secretary for S. Austin Johnson

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EXHIBIT A

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State of Utah)

) ss. Declaration of Maricela Quispe

County of Utah)

I, Maricela Quispe, declare the following to be true and correct under penalty of perjury under the laws of the State of Utah;

1. I am a resident of Orem, UT;

2, I was a passenger in the 1986 Toyota Pickup 4X4 driven by my husband Oscar Mercado on Febr 28, 2007, on I-15, near Lehi at about 7 to 8 p.m., when we were involved in an accident.

3. My husband did not have any fault in causing the motor vehicle accident between Lindsey Hill and myself. I saw a vehicle stopped in our lane of travel. Its rear lights were on like it was traveling forward. My husband noticed the vehicle was not going forward and he was able to stop suddenly and avoid any impact with the vehicle that was stopped in our lane in front of us. Lindsey Hill was the driver who hit me from behind.

4. I had terrible pain where the seat belt came across my chest. I suffered much pain in the neck, my chest, and my head and my back. I still suffer so much pain that it is uncomfortable to work. I have not worked since November 2009. When I use my arms for more than one hour I get too much pain in my back and I cannot keep working. When I sit for very long and then get up I have much pain in my heels. My neck gets too painful even now when I keep it in one position for too long. The doctors say I damaged my nerve roots. In fact, I had so much chest pain and back pain in November 2009, that I had to go to the hospital. The doctors say my damage to my nerve roots & joints in bones make pain similar to a heart attack.

6. I went to Bolivia from November 14 to January 2, 2010.

7. The attorneys for the defendants took my deposition for about three hours. We continued the deposition because I was having too much pain. I scheduled in August 2009 to take my deposition. But then the attorneys for the defendants cancelled it. I have over 77 pages from the deposition. I presented all of my documents in support of my claim. I also completed interrogatory answers to explain how the accident happened and my injuries. I gave the defendants all of my medical records. I was never shown the pages from the first deposition. My medical records show my injuries are real.

I declare the above facts to be true and correct and I do so under penalty of perjury under the laws of the State of Utah on this 28 day of January, 2010.

X _____

Maricela Quispe

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State of Utah)

) ss. Declaration of Oscar Mercado

County of Utah)

I, Oscar Mercado, being first under oath, promise to tell the truth under penalty of perjury under the laws of the State of Utah, and state:

1. I am a resident of Orem, UT.

2, I was the driver in the 1986 Toyota Pickup 4X4 on Febr 28, 2007, on I-15, near Lehi at about 7 to 8 p.m., when we were involved in an accident.

3. I did not have any fault in causing the motor vehicle accident between Lindsey Hill and myself. I saw a vehicle stopped in our lane of travel. Its rear lights were on like it was traveling forward. I noticed the vehicle was not going forward and I was able to stop suddenly and avoid any impact with the vehicle that was stopped in our lane in front of us. Lindsey Hill was the driver who hit me from behind. She hit me immediately when I was coming to a full stop. I did not hit the vehicle that was stopped in front of me. She was following too close, traveling too fast, or not paying attention so she hit me in the back of my car when I came to a stop.

4. When I was in the hospital with my wife the police officer who investigated the accident called me. He wanted my insurance information. He told me the vehicle in front of me caused the accident. The driver ran out of gas. He left the vehicle in the lane of travel. He did not move it off the side of the road. He abandoned the vehicle and did not turn on emergency flashers or warning lights. The vehicle was owned and driven by Defendant Diamond Line Deliver Systems.

5. I had terrible pain at the time of the accident. I have been diagnosed with a fractured pelvic bone, fractured coccyx, herniated disc at L4-5, and strain of my back. Dr. Richie, an orthopedic surgeon was considering surgery. I could not work for six months after the accident. I stopped working very much overtime. I can only work at a level 2 when before the accident I was working at a level 5. I continue to have some pain.

6. I went to Bolivia from December 3 to January 2, 2010.

7. The attorneys for the defendants took my deposition on two separate days. I was about 8 hours and then another four hours. I have over 66 pages from the second deposition. I did not see the transcript from the first deposition. I presented all of my documents in support of my claim. I also completed interrogatory answers to explain

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how the accident happened and my injuries. I gave the defendants all of my medical records. My medical records show my injuries are real. All of my effort in providing this information has been to show the defendants that they were at fault in causing the accident; that I had no fault; and that my injuries are real.

I declare the above facts to be true and correct and I do so under penalty of perjury under the laws of the State of Utah on this ___ day of January, 2010.

_____

Oscar Mercado

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_Ortho Prog Note

Patient: OSCAR MERCADO EMRN: 365217
DOB: Jun 29, 1964 5095611

Encounter Date: Jun 8 2007 10:00AM

INITIAL PATIENT EVALUATION

PATIENT: Oscar Mercado

DATE: 05/08/2007

He presents via his primary care physician for evaluation of his back.

PAIN: He was involved in a motor vehicle accident February 28, 2007. For me he describes a lower lumbar ache as well as rectal pain. initially the rectal pain was quite severe. he describes it initially as a very sharp nail type pain. now it is more of a defuse ache.

RADICULOPATHY: None.

TREATMENT: Apparently he had what sounds like a GI swallow, a good portion of his stomach pan and rectal pain is diminished, but not completely resolved.

SOCIAL HISTORY: He is married, he works at Nestles. He continue to work at this time.

PHYSICAL EXAMINATION: Pleasant gentleman. He looks like he has Bell's Palsy. I did not question him about that, but he ambulates under his own power and he has no focal deficits. He has minimal pan to his coccyx with palpation.

IMAGING: X-rays of the lumbar spine a sacrum taken in the office today reveals, AP pelvis x-ray reveals what appears to be a _____ pubis right sided fracture, minimally displaced, but nevertheless present. Coccyx is angled anteriorly, no specific fractures noted, but the anterior angulation gives concern.

Two views of the lumbar spine shows what appears to be an L5 pars fracture, no conclusive, but certainly suspicious. He does have an anterior osteophyte superior aspect of L5.

IMPRESSION:
1. Pubic fracture.
2. Coccydynia.
3. Low back pain, possible pars fracture.

RECOMMENDATIONS:
1. CT lumber spine.
2. Continue working I did not change that at all.
3. No medication was requested or given today.
4. We will follow up with CT of the lumbar spine.

Joseph L. Richey, M.D.

Received for:Joseph L Richey M.D. Jun 11 2007 7:03PM Mountain Standard Time

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_Ortho Prog Note

Patient:	OSCAR MERCADO	EMRN:	365217
DOB:	Jun 29, 1964		5174755

Encounter Date: Jun 26 2007 3:30PM

S: Oscar presents today for first perusal of his lumbar MRI. The lumbar MRI shows osteoarthritis changes at L3-4, L4-5 and L5/S1 without nerve root compromise.

His chief complaint continues to be buttocks pain as well as pelvic pain. he even indicates that it is difficult to have intimate relations with his wife.

Socially he has been a professional soccer player in Peru. He has even coached and organized soccer teams. He has not been able to do that this year because of his car accident and subsequent pain.

O: Alert and oriented, no focal motor deficit. He seems appropriate.

Imaging: MRI as above. I do not see a new problem related to his spine that would have necessarily occurred in the car accident.

We do know by plain films that he has a pelvic fracture and also by plain films displaced coccygeal injury.

I: Coccydynia, pelvic fracture.

R: 1. He is approximately four months out form his injury. I recognize that he has a pelvic fracture and a coccydynia issue, but would not necessarily operate this soon. For his coccyx I would suggest waiting another four months. If coccydynia continues to be an issue then a coccygectomy would be recommended. With respect to his pelvic fracture, like I said he is only four months out. This should heal, this should improve, and it should not be a long term problem. I have explained this to Oscar and we will follow up in four months for review of these two issues.

Received for:Joseph L Richey M.D. Jun 28 2007 1:04PM Mountain Standard Time

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_Ortho Prog Note

Patient:	OSCAR MERCADO	EMRN:	365217
DOB:	Jun 29, 1964		5174759

Encounter Date: Jun 26 2007 3:30PM

ADDENDUM

He did explain to me that he was driving down the freeway when someone stopped in front of him. I think five cars ahead of him stopped, every body else seemed to be stopping, but unfortunately the person in the back and basically hit every body.

Received for:Joseph L Richey M.D. Jun 28 2007 1:06PM Mountain Standard Time

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27

GARCIA & LOVE

COURT REPORTING AND VIDEOGRAPHY

July 14, 2009

In re: *Oscar Mercado, et al. v. Lindsey Hill, et al.*
Case No. 070403371
Date of Deposition: May 4, 2009
Deposition of: Oscar Mercado, Vol. II

Please be advised that the witness was sent a certified reading copy of the sworn deposition for review and signature. Thirty days have elapsed and no signature having been obtained, the **UNSIGNED ORIGINAL** has been sealed and returned to counsel listed below for safekeeping until trial or other disposition of the case.

Terry M. Plant, Esq.
Plant Christensen & Kanell
136 East South Temple, Suite 1700
Salt Lake City, Utah 84111

Sincerely,

Mandi Myers

Mandi Myers, Manager

MM:dh

ccs: S. Austin Johnson, Esq.
Trevor Bradford, Esq.

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GARCIA & LOVE

COURT REPORTING AND VIDEOGRAPHY

July 14, 2009

In re: *Oscar Mercado, et al. v. Lindsey Hill, et al.*
Case No. 070403371
Date of Deposition: May 4, 2009
Deposition of: Marciela Quispe

Please be advised that the witness was sent a certified reading copy of the sworn deposition for review and signature. Thirty days have elapsed and no signature having been obtained, the **UNSIGNED ORIGINAL** has been sealed and returned to counsel listed below for safekeeping until trial or other disposition of the case.

Terry M. Plant, Esq.
Plant Christensen & Kanell
136 East South Temple, Suite 1700
Salt Lake City, Utah 84111

Sincerely,

Mandi Myers

Mandi Myers, Manager

MM:dh

ccs: S. Austin Johnson, Esq.
Trevor Bradford, Esq.

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GARCIA & LOVE

COURT REPORTING AND VIDEOGRAPHY

June 30, 2009

In re: *Oscar Mercado, et al. v. Lindsey Hill, et al.*
Case No. 070403371
Date of Deposition: April 9, 2009
Deposition of: Oscar Mercado

Please be advised that the witness was sent a certified reading copy of the sworn deposition for review and signature. Thirty days have elapsed and no signature having been obtained, the **UNSIGNED ORIGINAL** has been sealed and returned to counsel listed below for safekeeping until trial or other disposition of the case.

Terry M. Plant, Esq.
Plant Christensen & Kanell
136 East South Temple, Suite 1700
Salt Lake City, Utah 84111

Sincerely,

Mandi Myers

Mandi Myers, Manager

MM:dh

ccs: S. Austin Johnson, Esq.
Trevor Bradford, Esq.

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CONDENSED TRANSCRIPT

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

OSCAR MERCADO, MARICELA QUISPE,	)	Civil No. 070403371
Plaintiffs,	)	
vs.	)	Deposition of:
LINDSEY HILL, DIAMOND LINE DELIVERY SYSTEM,	)	**OSCAR MERCADO**
Defendants.	)	

April 9, 2009
8:53 a.m.
Plant, Christensen & Kanell
136 East South Temple, Suite 1700
Salt Lake City, UT 84111

* * *

Sharon Morgan
- Certified Realtime Reporter -

GARCIA & LOVE
COURT REPORTING AND VIDEOGRAPHY

257 East 200 South • Suite 300 • Salt Lake City, UT 84111 • 801.538.2333 • Fax 801.538.23

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TERRY M. PLANT, #2610
PLANT, CHRISTENSEN & KANELL
Attorneys for Defendant Diamond Line Delivery System
136 East South Temple, Suite 1700
Salt Lake City, Utah 84111
Telephone: (801) 363-7611

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

OSCAR MERCADO, MARICELA QUISPE, Plaintiffs, v. LINDSEY HILL, DIAMOND LINE DELIVERY SYSTEM, Defendants.	**NOTICE OF DEPOSITION OF PLAINTIFFS** Civil No. 070403371 Judge Claudia Laycock

TO THE ABOVE NAMED PARTIES AND THEIR ATTORNEYS:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that on Wednesday, the 11th day of March, 2009, Defendant Diamond Line Delivery System will take the following depositions, before a certified court reporter, and notary public, at the Johnson Law Office, 251 West Riverpark Drive, Suite 100, Provo, UT 84604:

Oscar Mercado	9:00 a.m.
Maricela Quispe	immediately following the completion of Mr. Mercado's deposition

These depositions will be on oral interrogatories and are taken pursuant to Rules 26 and 30 of the Utah Rules of Civil Procedure. You are invited to be present and examine the witnesses.

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DATED this 17th day of February, 2009.

PLANT, CHRISTENSEN & KANELL

TERRY M. PLANT
Attorneys for Diamond Line Delivery System

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing was mailed, postage prepaid, this 17th day of December, 2008 to the following:

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EXHIBIT B

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B84636

RESUME OF RECORDED STATEMENT TAKEN FROM Lindsey Hill OVER THE PHONE BY BEN WINEGAR ON March 9, 2007

Lindsey stated that the accident was on February 28, 2007 at about 8:00 PM. Lindsey Hill lives at 1755 North Blue Bird Road, Orem UT 84097. Her date of birth is 11-25-1985. She was driving a 2001 silver Dodge Dakota owned by her, it is an extended cab. She had no passengers and was not injured. The accident occurred on southbound I-15 just before the 1600 North/Lindon Exit. There was not a lot of traffic. There was no construction in the area. There were no signals for the truck being stopped. The other vehicle involved in the accident was a red S-10, 1986 pickup.

Lindsey said that she was driving home from Lehi. She had her cruise control set at 66 mph in the slow lane. She said that brake lights came on in front of her and traffic came to a dead stop. Lindsey hit her brakes as hard as she could to avoid hitting the car in front of her but she was not able to stop. Lindsey said that the accident occurred so quick she did not have time to stop. There were a few cars behind her that swerved off the side of the road to avoid hitting her. Lindsey said that she does not remember how many cars were in front of her. She was not too far from the semi but she can not say how many other vehicles were behind the trailer stopped prior to her getting there. The tractor trailer was at the top of the off ramp just before you start going down past the overpass. The Truck was before the offramp. Lindsey did not see the truck until after the impact occurred. They waited at the scene of the accident for quite a while but the truck was still sitting on the freeway. As they were stopped, people were not slowing down but just slamming on brakes and swerving into the other lanes. Lindsey said that she did not remember any flares or indicators that warned of the truck sitting there.

The Utah Highway Patrol responded to the accident. Lindsey said that the UHP took 30 to 40 minutes to respond to the scene of the accident. Lindsey did not get a ticket and no one else did. Lindsey said that there was not enough damage to fill out a report but because the claimants were complaining of problems with the vehicle, they filled out a report.

Lindsey has reported this accident to her agent but no claim has been filed. Lindsey said that she hit the vehicle from behind but the situation was out of her control. She said the sudden stop was a lot of the reason the accident occurred.

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B84636

RESUME OF RECORDED STATEMENT TAKEN FROM Oscar Mercado IN PERSON BY BEN WINEGAR ON March 9, 2007

Oscar stated that the accident occurred on February 28, 2007 at about 8:00 PM. Oscar Mercado's address is 289 North 1030 West, Orem UT 84057.. His date of birth is 06-29-1964. Oscar was employed at Stauffer's prior to the accident, he is not able to work now. Oscar stated he was driving a 1999 red Ford 4X4 pickup at the time of the accident. He and his wife were both seatbelted. The accident occurred on the freeway headed south towards Orem.

Oscar came to a line of cars that were all stopped in the freeway. He was changing gears from fifth down to first to a stop. He said that as he stopped behind the car in front of him he was there for a short second. He said that he was just changing gears to first gear again to start going when he was hit from behind. He described the impact as very hard. He said that he swerved right to avoid hitting the car in front of him. He said that there were 15 or so cars in front of him stopped. He said they were stopped for a large tractor trailer that was stopped on the freeway. He said that as he approached the stopped tractor trailer, he could see lots of stop lights on the freeway. The vehicle behind him was a truck also a Dakota. The only accident was between Oscar and the car that struck him from behind. The other cars were stopped. Oscar stated that he saw the cars stopped on the freeway clearly and slowed to a stop. Oscar said that the driver of the car that struck him, told the people at the scene that she tried to stop but could not.

The Utah Highway Patrol came to the scene of the accident. Oscar said that there were no citations that he knows of, but the driver of the car behind him admitted she was at fault. Oscar said that at the time of the accident, he did not know about the tractor trailer that was stopped on the freeway. He could not see it, he just saw all the brake lights. The investigating officer called after the accident and told him that the truck driver was stopped on the freeway.

Oscar said that at the time of the impact, he was concerned about his wife, Maricela immediately was bent over in pain. Oscar knew he was injured but concentrated on his wife more then himself. Oscar said that his whole back was hurting. He said that the back of his neck and his lower back was really hurting him. Oscar said that instead of waiting for the ambulance, he and his wife were taken to the hospital in a vehicle of a friend. Oscar said that his stomach started to hurt really bad. He is not bruised but it is still hurting. Oscar went to the hospital the next day and went to the chiropractor, Clifford Lincoln. He said that he has some numbness and pain in his left arm and left knee. They both feel weak and asleep. Oscar said that he has not had this problem ever. He said that 12 years ago, he had a prior accident and fractured his atlas. This accident occurred in Peru. He treated for 1 year for this accident and has not had any problem since.

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At Stauffer's, Oscar was working 60 to 52 hours per week. He was making $14.29 per hour. Oscar said that when he went to work at Stauffer's, he passed a test with flying colors, thus showing that he was in good health prior to the accident. He had worked for 8 months at Stauffer's. He is married to his wife Maricela Quispe and has 3 children, two daughters that live with him and one son that he supports going to college in Peru.

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B84636

RESUME OF RECORDED STATEMENT TAKEN FROM Maricela Quispe IN PERSON BY BEN WINEGAR ON March 9, 2007

Maricela's is 289 North 1030 West, Orem UT 84057. Her date of birth is 02-24-1962. Maricela said that they were traveling back home from purchasing the truck that they were in the accident.

Maricela stated that she was sitting in the passenger seat. She said that her husband was not traveling too fast. He said that he looked and saw the red lights and her husband slowed to a stop. Maricela said that in a few seconds she felt a large impact from behind. She said that there was a delay between when they stopped and the impact but she is not sure how long that was, she lost track of time. Maricela said that as she and Oscar approached the stopped cars, just before the accident she wondered out loud why the cars would be stopped on the freeway. Maricela said that she did not know about the tractor trailer until after she was already at the hospital.

Maricela said that upon impact, she was in a lot of pain. She said that her chest, where the seatbelt was caused her to have a lot of pain. She had lots of pain in her neck and back, but the seatbelt felt like it had burned her. Maricela said that her skin was red and swollen across her chest. Maricela said that her stomach did not hurt as much as her chest. She said that she just stayed in her seat. Maricela said that right after the impact, while she was still in the truck, her back and neck hurt very bad. She can not even sit without putting her hands down to support her back. She said that her right hip started hurting right after the accident, and now, she has pain in her left hip also. Maricela went to the U of U hospital and saw Dr. Clayson and Dr. Fernandez. Maricela can not even bend her head to eat. Maricela is having a hard time sleeping. Maricela said that when she went to the hospital, she was not able to move her hip to climb the stairs. She also has a lot of pain in her heels. She has equal pain in both heels, especially when she is walking. Maricela is seeing a doctor and is in therapy. She is also going to a chiropractor, Lincoln Clifford, 3 times a week. Maricela has not had any problems like this before.

Maricela is Oscar's wife and has 3 children. Maricela is having her sister come in to help clean and cook and is charging her $10 per hour to do so. Maricela was working with SOS staffing, working at Nuskin in Provo. She was working 10 hours per day working overtime. She makes $8.00 per hour. She has not been able to work since the date of the accident.

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TIME

Date of Crash: Month 02 / Day 28 / Year 07

Day of Week: 1 2 3 **X** 5 6 7 — S M T W T F S

Military Time: 20:00

DLD Number:

LOCATION

PLACE WHERE CRASH OCCURRED: 49 COUNTY CODE

City or Town of Jurisdiction: Lindon

If crash was outside city limits indicate distance from city limits or nearest town: ____ Miles ☐N ☐S ☐E ☐W of ____ City or Town

ROAD, STREET, HWY CRASH OCCURRED: I-15 (Street Name or Highway Number)

UDOT USE ONLY

1. AT THE INTERSECTION WITH ____

2. IF NOT AT INTERSECTION 0 Feet ☐N ☒S ☐E ☐W of Geneva Road Structure (Nearest Intersection, street, house no., landmark)

2 (Tenth of a mile) ☒N ☐S ☐E ☐W of Mile Post 273 (Be sure to complete if road has mile post)

Case Number: 060700600

Latitude | Longitude

REPORTABLE CRASH: ☒ YES ☐ NO

UDOT USE

VEHICLE 1

VEH #	VIN#	NUMBER	STATE	EXP DATE	COLOR	MAKE	MODEL	YEAR	OCCUPANT(S)
1	3BKMLD9X26F138638	BF2676	ID	06/07 (mm/yy)	WHI	KW	SEMI	2006 (yyyy)	# 0

DRIVER

FIRST	INITIAL	LAST	STREET, CITY, STATE, ZIP	PHONE
			,	

DRIVER LICENSE

STATE	NUMBER	CLASS	ENDORSEMENT(S)	RESTRICTION(S)	DATE OF BIRTH (mm dd yyyy)	AGE	CHARGE(S)	CITATION #
					/ /		☐YES ☐NO ☐PENDING ☐UNKNOWN	

OWNER

FIRST	INITIAL	LAST	STREET, CITY, STATE, ZIP	PHONE
Diamond Line Delivery ☐ Same as Driver			PO Box 938, Meridian ID 83680	(208) 884-1846

CARRIER

COMMERCIAL VEHICLE INFO — NAME: System — ☒ Same as Owner — STREET, CITY, STATE, ZIP: , — PHONE: — ☒ CDL Presented at Scene

US DOT #	CVSA INSPECTION #	GCWR / GVWR (check one)	HAZ MAT RELEASED	HAZ MAT PLACARD # or NAME - CLASS	CARGO CODE	PURPOSE OF USE
887550		☐ 10,000 lbs or LESS ☒ 10,001 - 26,000 lbs ☐ MORE THAN 26,000 lbs	☐ YES ☒ NO		00	☒ INTERSTATE ☐ INTRASTATE ☐ GOVT ☐ PERSONAL

1ST TRAILER LICENSE PLATE #	STATE	EXP DATE (mm yy)	LENGTH	2ND TRAILER LICENSE PLATE #	STATE	EXP DATE (mm yy)	LENGTH	3RD TRAILER LICENSE PLATE #	STATE	EXP DATE (mm yy)	LENGTH
		/				/				/	

SPEED	POSTED	POSTED ADVISORY	EST TRAVEL	EST IMPACT	ESTIMATED BY	SEQUENCE OF EVENTS (Codes 01 - 69, 96)	FIRST EVENT	SECOND EVENT	THIRD EVENT	FOURTH EVENT	MOST HARMFUL EVENT For VEHICLE (Use codes 00, 07 - 69)
	65	-	0	0	☒ Officer ☐ Driver ☐ Occupant ☐ Witness ☐ None		19	96	96	96	19

VEHICLE DAMAGE	INSURANCE COMPANY	EFFECTIVE DATE	EXPIRATION DATE	POLICY NUMBER
☒ NO DAMAGE ☐ $1 - $999 ☐ $1,000 or MORE	Great West Casualty Co.	10/01/2006	10/01/2007	GWP10136E

INSURANCE APPEARS VALID	AGENCY/AGENT THAT SOLD POLICY	ADDRESS	PHONE
☒ YES ☐ NO	Kaufman &Kaufman Insurance	P.O. Box 7873 Boise, ID 83707	

VEHICLE 2

VEH #	VIN#	NUMBER	STATE	EXP DATE	COLOR	MAKE	MODEL	YEAR	OCCUPANT(S)
2	JT4RN63R9G0038746	102WXY	UT	05/08 (mm/yy)	RED	TOYT	R6344P	1986 (yyyy)	# 2

DRIVER

FIRST	INITIAL	LAST	STREET, CITY, STATE, ZIP	PHONE
OSCAR		MERCADO	223 N 300 E, Orem Utah 84057	(801) 426-4952

DRIVER LICENSE

STATE	NUMBER	CLASS	ENDORSEMENT(S)	RESTRICTION(S)	DATE OF BIRTH (mm dd yyyy)	AGE	CHARGE(S)	CITATION #
UT	171212655	D	-	B	06/29 /64	43	☐YES ☒NO ☐PENDING ☐UNKNOWN	

OWNER

FIRST	INITIAL	LAST	STREET, CITY, STATE, ZIP	PHONE
ZARELA ☐ Same as Driver		STALLINGS	49 NO. CAMERON ST., LEHI UT 84043	

CARRIER

COMMERCIAL VEHICLE INFO — NAME: — ☐ Same as Owner — STREET, CITY, STATE, ZIP: , — PHONE: — ☐ CDL Presented at Scene

US DOT #	CVSA INSPECTION #	GCWR / GVWR (check one)	HAZ MAT RELEASED	HAZ MAT PLACARD # or NAME - CLASS	CARGO CODE	PURPOSE OF USE
		☐ 10,000 lbs or LESS ☐ 10,001 - 26,000 lbs ☐ MORE THAN 26,000 lbs	☐ YES ☒ NO			☐ INTERSTATE ☐ INTRASTATE ☐ GOVT ☐ PERSONA

1ST TRAILER LICENSE PLATE #	STATE	EXP DATE (mm yy)	LENGTH	2ND TRAILER LICENSE PLATE #	STATE	EXP DATE (mm yy)	LENGTH	3RD TRAILER LICENSE PLATE #	STATE	EXP DATE (mm yy)	LENGTH
		/				/				/	

SPEED	POSTED	POSTED ADVISORY	EST TRAVEL	EST IMPACT	ESTIMATED BY	SEQUENCE OF EVENTS (Codes 01 - 69, 96)	FIRST EVENT	SECOND EVENT	THIRD EVENT	FOURTH EVENT	MOST HARMFUL EVENT For VEHICLE (Use codes 00, 07 - 69)
	65	-	0	0	☐ Officer ☒ Driver ☐ Occupant ☐ Witness ☐ None		97	20	96	96	20

VEHICLE DAMAGE	INSURANCE COMPANY	EFFECTIVE DATE	EXPIRATION DATE	POLICY NUMBER
☐ NO DAMAGE ☒ $1 - $999 ☐ $1,000 or MORE	Farmers	10/05/2006	03/19/2007	76170653995

INSURANCE APPEARS VALID	AGENCY/AGENT THAT SOLD POLICY	ADDRESS	PHONE
☒ YES ☐ NO			

Work Zone?	Total # of Lanes on Roadway	Damage to Property Other than Vehicles (Name object and state nature)
☐Yes ☒No ☐Unknown	4	
Workers Present?	**# Vehicles Involved**	**Name and Address of Owner of Object Struck** / **Phone ( )** / **PROPERTY DAMAGE ESTIMAT**
☐Yes ☒No ☐Unknown	3	☐$1,000 OR MORE ☐LESS THAN $1,0

WITNESSES

Name / Address / Phone

Name / Address / Phone

Law Enforcement Activity

Time Notified of Crash	Arrived at Scene	Date Notified of Crash	Investigation Completed
19:50	20:15	02 / 28 / 07	02 / 28 / 07
Use Military Time		mm dd yy	mm dd yy

Field Diagram ☐Yes ☒No | Video ☐Yes ☒No | Photo (s) ☐Yes ☐Digital ☒No ☐Film

☒ ORIGINAL REPORT ☐ ADDITIONAL PERSONS REPORT ☐ SUPPLEMENTAL REPORT ☐ AMENDED REPOR

State Law Requires a Reportable Crash Report to be Forwarded to Dept. of Public Safety Within 10 Days Following Completion of Investigation.

Mail ORIGINAL REPORT TO: Driver License Division, 4501 South 2700 West, P.O.Box 30560, Salt Lake City, Utah 84130-0560

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TIME

Date of Crash: Month 02 / Day 28 / Year 07

Day of Week: 1 2 3 **X** 5 6 7 — S M T W T F S

Military Time: 20:00

DLD Number:

LOCATION

PLACE WHERE CRASH OCCURRED: COUNTY CODE 49

City or Town of Jurisdiction: Lindon

If crash was outside city limits indicate distance from city limits or nearest town: ____ Miles N S E W of ____ City or Town

ROAD, STREET, HWY CRASH OCCURRED: I-15 (Street Name or Highway Number)

UDOT USE ONLY

1. AT THE INTERSECTION WITH ____

2. IF NOT AT INTERSECTION 0 Feet N S E W of Geneva Road Structure (Nearest Intersection, street, house no., landmark)

2 Tenth of a mile N S E W of Mile Post 273 (Be sure to complete if road has mile post)

Case Number: 060700600

Latitude | Longitude

REPORTABLE CRASH: [X] YES [ ] NO

UDOT USE

VEH # 1 (Owner)

VIN: 1B7GG22N31S252555

NUMBER: 224VVR | STATE: UT | EXP DATE: 07/07 (mm/yy) | COLOR: AMETHYST | MAKE: DODG | MODEL: DAKOTA | YEAR: 2001 | OCCUPANT(S): # 1

DRIVER

FIRST: LINDSEY | INITIAL | LAST: HILL

STREET, CITY, STATE, ZIP: 1755 North Bluebird Road, Orem Utah 84097 | PHONE: (801) 225-7544

DRIVER LICENSE

STATE: UT | NUMBER: 168723728 | CLASS: D | ENDORSEMENT(S): - | RESTRICTION(S): A | DATE OF BIRTH: 11/25/85 (mm dd yyyy) | AGE: 21 | CHARGE(S): [ ] YES [X] NO [ ] PENDING [ ] UNKNOWN | CITATION #

OWNER

FIRST | INITIAL | LAST | [X] Same as Driver | STREET, CITY, STATE, ZIP | PHONE

CARRIER

COMMERCIAL VEHICLE INFO | NAME | STREET, CITY, STATE, ZIP | PHONE | [ ] Same as Owner | [ ] CDL Presented at Scene

US DOT # | CVSA INSPECTION # | GCWR / GVWR (check one): [ ] 10,000 lbs or LESS [ ] 10,001 - 26,000 lbs [ ] MORE THAN 26,000 lbs | HAZ MAT RELEASED: [ ] YES [X] NO | HAZ MAT PLACARD # or NAME - CLASS | CARGO CODE | PURPOSE OF USE: [ ] GOVT [ ] PERSONAL [ ] INTERSTATE [ ] INTRASTATE

1ST TRAILER LICENSE PLATE # | STATE | EXP DATE (mm / yy) | LENGTH | 2ND TRAILER LICENSE PLATE # | STATE | EXP DATE (mm / yy) | LENGTH | 3RD TRAILER LICENSE PLATE # | STATE | EXP DATE (mm / yy) | LENGTH

SPEED: POSTED 65 | POSTED ADVISORY - | EST TRAVEL 65 | EST IMPACT 20 | ESTIMATED BY: [ ] Officer [X] Driver [ ] Occupant [ ] Witness [ ] None

SEQUENCE OF EVENTS (Codes 01 - 69, 96): FIRST EVENT 20 | SECOND EVENT 96 | THIRD EVENT 96 | FOURTH EVENT 96

MOST HARMFUL EVENT For VEHICLE (Use codes 00, 01 - 69): 20

VEHICLE DAMAGE: ESTIMATED DAMAGE [X] $1 - $999 [ ] $1,000 or MORE [ ] NO DAMAGE

INSURANCE COMPANY: OWNERS INSURANCE COMPANY | EFFECTIVE DATE: 02/19/2007 | EXPIRATION DATE: 03/01/2008 | POLICY NUMBER: 44-324-427-00

INSURANCE APPEARS VALID: [X] YES [ ] NO | AGENCY/AGENT THAT SOLD POLICY | ADDRESS | PHONE: (801) 225-2442

VEH # 2 (Other)

VIN# | NUMBER | STATE | EXP DATE (mm/yy) | COLOR | MAKE | MODEL | YEAR | OCCUPANT(S): # 2

DRIVER

FIRST | INITIAL | LAST | STREET, CITY, STATE, ZIP | PHONE

DRIVER LICENSE

STATE | NUMBER | CLASS | ENDORSEMENT(S) | RESTRICTION(S) | DATE OF BIRTH (mm / dd / yyyy) | AGE | CHARGE(S): [ ] YES [ ] NO [ ] PENDING [ ] UNKNOWN | CITATION #

OWNER

FIRST | INITIAL | LAST | [ ] Same as Driver | STREET, CITY, STATE, ZIP | PHONE

CARRIER

COMMERCIAL VEHICLE INFO | NAME | STREET, CITY, STATE, ZIP | PHONE | [ ] Same as Owner | [ ] CDL Presented at Scene

US DOT # | CVSA INSPECTION # | GCWR / GVWR (check one): [ ] 10,000 lbs or LESS [ ] 10,001 - 26,000 lbs [ ] MORE THAN 26,000 lbs | HAZ MAT RELEASED: [ ] YES [ ] NO | HAZ MAT PLACARD # or NAME - CLASS | CARGO CODE | PURPOSE OF USE: [ ] GOVT [ ] PERSONAL [ ] INTERSTATE [ ] INTRASTATE

1ST TRAILER LICENSE PLATE # | STATE | EXP DATE (mm / yy) | LENGTH | 2ND TRAILER LICENSE PLATE # | STATE | EXP DATE (mm / yy) | LENGTH | 3RD TRAILER LICENSE PLATE # | STATE | EXP DATE (mm / yy) | LENGTH

SPEED: POSTED | POSTED ADVISORY | EST TRAVEL | EST IMPACT | ESTIMATED BY: [ ] Officer [ ] Driver [ ] Occupant [ ] Witness [ ] None

SEQUENCE OF EVENTS (Codes 01 - 69, 96): FIRST EVENT | SECOND EVENT | THIRD EVENT | FOURTH EVENT

MOST HARMFUL EVENT For VEHICLE (Use codes 00, 01 - 69):

VEHICLE DAMAGE: ESTIMATED DAMAGE [ ] $1 - $999 [ ] $1,000 or MORE [ ] NO DAMAGE

INSURANCE COMPANY | EFFECTIVE DATE | EXPIRATION DATE | POLICY NUMBER

INSURANCE APPEARS VALID: [ ] YES [ ] NO | AGENCY/AGENT THAT SOLD POLICY | ADDRESS | PHONE

Work Zone? [ ] Yes [X] No [ ] Unknown

Workers Present? [ ] Yes [X] No [ ] Unknown

Total # of Lanes on Roadway 4

Vehicles 3 Involved

Damage to Property Other than Vehicles (Name object and state nature)

Name and Address of Owner of Object Struck | Phone ( )

PROPERTY DAMAGE ESTIMATE: [ ] $1,000 OR MORE [ ] LESS THAN $1,000

WITNESSES

Name ____ Address ____ Phone ____

Name ____ Address ____ Phone ____

Law Enforcement Activity

Time Notified of Crash (Use Military Time)	Arrived at Scene	Date Notified of Crash (mm dd yy)	Investigation Completed (mm dd yy)
19:50	20:15	02 / 28 / 07	02 / 28 / 07

Field Diagram: [ ] Yes [X] No | Video: [ ] Yes [X] No | Photo (s): [ ] Yes [ ] Digital [X] No [ ] Film

[X] ORIGINAL REPORT [ ] ADDITIONAL PERSONS REPORT [ ] SUPPLEMENTAL REPORT [ ] AMENDED REPORT

State Law Requires a Reportable Crash Report to be Forwarded to Dept. of Public Safety Within 10 Days Following Completion of Investigation.

Mail ORIGINAL REPORT TO: Driver License Division, 4501 South 2700 West, P.O.Box 30560, Salt Lake City, Utah 84130-0560

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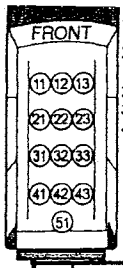
SEATING POSITION



11 - Motorcycle Driver
21 - Motorcycle Passenger
18 - Front Row Other
28 - Second Row Other
38 - Third Row Other
48 - Fourth Row Other
50 - Sleeper Section of Cab (Truck)
51 - Enclosed Cargo Area
52 - Unenclosed Cargo Area
54 - Trailing Unit
55 - Riding on Vehicle Exterior
56 - Seating Position 11, Not Driver
57 - Right Side Driver
60 - Non-Motorist
97 - Other*
99 - Unknown

EMS Time Called: EMS Time Arrived:

Disposition of Vehicle # 1: 02 TOWED BY: Larry's Towing

Disposition of Vehicle # 2: 01 TOWED BY:

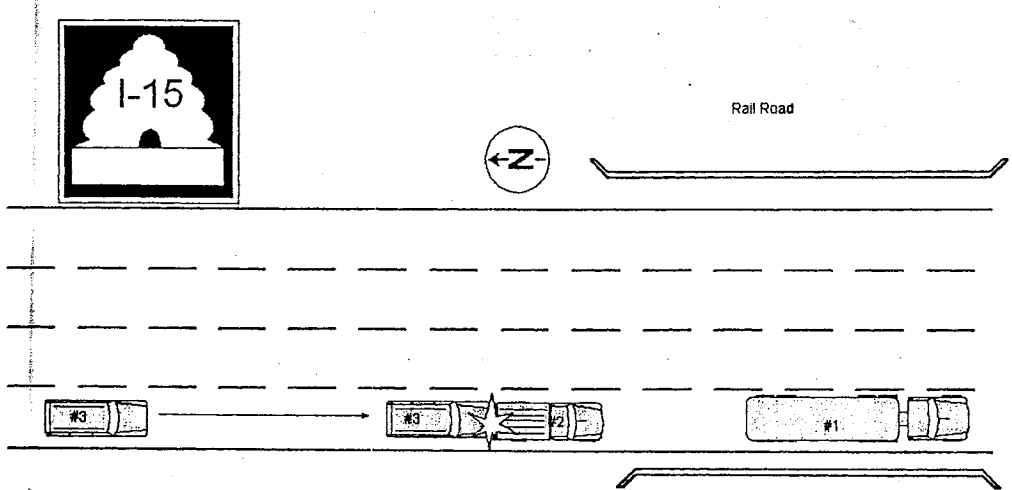
PERSON(S) INVOLVED

								INJURY										
VEH #		Transported to:			BAC	Person Type	Seating Position	Sex	Level	Area	Cause	Transported By	Safety Equipment	Used Properly	Air Bag	Ejection	Ejection Path	Extrication
VEH #2	DRIVER	Transported to: -			BAC -	01	11	Male	01	96	96	96	01	01	00	00	96	01
VEH	Name: Quispe, Marcela		DOB	Age	Transported to: -										BAC -			
# 2	Address: 1445 So. 640 E., Orem UT 84097	Phone				02	13		02	03	04	01	01	01	00	00	96	01
VEH	Name: TEAMS, DAVID A		DOB 07/02/1962	Age 44	Transported to:										BAC			
#	Address: 265 North 200 East, Payson Utah 84651	Phone: (801) 465-4086				97												
VEH	Name: ,		DOB	Age	Transported to:										BAC			
#	Address	Phone																
VEH	Name: ,		DOB	Age	Transported to:										BAC			
#	Address	Phone																

24 00
24 00
25 01
26 03
27 01
28 00
29 01

DIAGRAM of CRASH ☐ NO DIAGRAM - Reason: _____ 1. Officer not at scene 2. Vehicles moved 3. Other _____

DLD#



DESCRIBE WHAT HAPPENED
(Refer to Vehicle by Number)

Vehicle one was left abandoned on I-15 in the slow lane. Vehicles two and three were traveling southbound in the slow lane. Vehicle two was able to stop for the parked semi. Vehicle three was unable to stop and struck the back of vehicle two.

David A. Teams is the driver of the semi that was left abandoned on I-15 in the #3 lane, but was not with the vehicle at the time of the collision.

OFFICER'S RANK AND NAME	I.D. #	DEPARTMENT	CASE NUMBER	SUPERVISOR'S APPROVAL	DATE OF REPORT
PRINT Korey R. Wright	249	UHP Section 6	060700600		02/28/2007

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JOHNSON LAW ASSOCIATES
P.O. Box 970880
Orem, UT 84097-0880
Tel: (801) 426-7900
Fax:(801) 607-2216
Attorney for Plaintiffs

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

Oscar Mercado and Mercicela Quispe, Plaintiffs, Vs. Joshua Stam Defendant.	PLAINTIFFS REQUEST FOR HEARING Case No: 070403371 Judge LAYCOCK

Comes now S. Austin Johnson, counsel for Plaintiffs, and hereby requests a hearing so the Court may address all of the pending proposed orders, motions to withdraw admissions, and motions for summary judgment, and extensions for time to respond to the motions for summary judgment.

Both defendants have proposed orders of dismissal based upon findings of fact and conclusions of law that suggest that Plaintiffs are deemed to have admitted that the defendants were not at fault and had no responsibility for the accident. These admissions come from plaintiffs failure to respond to requests for admissions. But the requests for admissions are improper and in bad faith. The motions for summary judgment cannot be granted because the alleged basis for the motions do not exist once the requests for admissions are withdrawn. The Plaintiffs motion to withdraw admissions should be granted because the admissions were improper, served when not allowed by the scheduling order, and sent to the wrong address for counsel for plaintiffs. These issues are complex and Plaintiffs request a hearing to clarify these matters.

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Respectfully,

Johnson Law Associates

By:_____
S. Austin Johnson
Attorney for Plaintiffs

I certify I sent a copy of this document by U.S. mail, from Orem, UT, on this 24th day of December, 2009, to:

Richard K. Glauser
Trevor A. Bradford
1218 East 7800 South, Suite 300
Sandy, UT 84094

Terry Plant
136 East South Temple, Suite 1700
Salt Lake City, UT 84111

_____
Attorney

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S. Austin Johnson, Esq. (USB# 5169)
JOHNSON LAW ASSOCIATES
P.O. Box 970880
Orem, UT 84097-0880
Tel: (801) 426-7900
Fax:(801) 607-2216
Attorney for Plaintiffs

2010 JAN -8 P 11:48

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

Oscar Mercado and Mercicela Quispe, Plaintiffs, Vs. Joshua Stam Defendant.	PLAINTIFFS RESPONSE TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF DISMISSAL Submitted by Defendant Diamond Line Delivery System Case No: 070403371 Judge LAYCOCK

Comes now S. Austin Johnson and hereby objects to the Proposed Findings of Fact, Conclusions of Law, and Order of Dismissal filed by Defendant Diamond Line Delivery System.

Plaintiffs object because the proposed order, findings and conclusions are completely based on false, improper and misleading arguments that have been advanced in bad faith. First, the order relies upon requests for admissions served on September 4, 2009. There was no authority for these requests for admissions to be served. Rule 36(a)(1), and 26(d), set time limits on when these requests may be served. The time period subjects the parties to the time periods in the rules, the scheduling order, stipulations by the parties or orders of the court. The parties rights to discovery were restricted by the scheduling order. The only scheduling order in place on September 2, 2009, was entered on December 9, 2008. This scheduling order provided that "Fact Discover is to be completed by **April 30, 2009."** There was no permission to engage in discovery outside that provided by the scheduling order. The requests for admissions could not be served until there was a new order in place that would permit this

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discovery. A new scheduling order was entered on October 1, 2009. But this order could not authorize the requests for admissions because they were already improperly served. The requests must be stricken. Counsel for Plaintiffs could not stipulate to the proposed scheduling order because the defendant's counsel proposed an order with deadlines that had already expired. The proposed order should have set deadlines in the future for Depositions, identification of experts and even requests for admissions. Without an agreement, the defendants should have submitted a request for a pre-trial conference.

Second, the requests for admissions are impermissible because they seek admissions concerning legal conclusions. The requests seek admissions that the driver who caused the accident was "not at fault for the accident," and "not responsible for the accident." Whether Defendant Hill has fault or responsibility is a legal conclusion. It is an improper admission. Rule 36, U.Civ.Prov., provides that admissions may only be served that "relate to statements or opinions of fact or of the application of law to fact." These admissions clearly require legal definitions of fault and responsibility. They request ultimate legal conclusions. This admission is not within the scope of permissible admissions.

Third, the requests for admissions should be withdrawn. Rule 36(b), U.Civ.Proc., provides that "the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits." Defendant DLDS cannot allege, and has not claimed any prejudice from withdrawal of the admissions because they seek admissions that are false. The defendant, in bad faith, seeks to impose falsity by gamesmanship, instead of seeking a just result.

Also, the requests for admissions and the motion for summary judgment were served on an address that counsel for plaintiff's left on February 1, 2009. Defendant DLDS had sent more recent

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documents to the P.O. Box, and to the new address on River Park Drive. But then counsel for DLDS served these documents to the oldest address.

1. Plaintiffs object to defendant's proposed finding of fact " DFF" 1 because the Requests for Admissions were improper. The scheduling order was entered on December 8, 2008. It provided that fact discovery ended on April 30, 2009. There was no scheduling order in place that allowed service of the requests for admissions on September 4, 2009 The requests for admissions were not properly served because they were not allowed by law.
2. Plaintiffs object to DFF 2, because Plaintiffs did not have to respond to the requests for admissions because they were improperly served when not permitted by the scheduling order. Plaintiffs did not have to respond by October 8, 2009, because they did not have 30 days to respond after permissible requests for admissions were served.
3. The DFF 3 and 4 cannot be adopted as fact because the false statements, alleged as fact, were not served within a valid time period when discovery could be performed.
4. The conclusions of law herein called " DCL" II, III, V are wrong. The requests for admissions cannot be deemed admitted when they are not allowed to be served by the scheduling order.
5. DCL IV . VI , is improper because the legal effect of unauthorized requests for admissions cannot relieve defendants of possible liability that arises from its negligence. Defendant DLDS caused a rear-end collision on Interstate I-15 by running out of gas and leaving the truck in the lane of traffic; not moving it off the side of the road. See the police report. In addition, it is totally improper because the conclusion relies upon requests for admissions that should be stricken because they were served without authority.
6. DCL VII, and VIII are improper because the requests for admissions cannot have the legal effect of making DLDS not liable for its negligence, nor cause a dismissal of the lawsuit when they were served without authority and should be withdrawn and stricken.

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Wherefore, Plaintiffs pray this Court deny the proposed findings of fact and conclusions of law.

Respectfully,

Johnson Law Associates

By:_____
S. Austin Johnson
Attorney for Plaintiffs

I certify I sent a copy of this document by U.S. mail, from Orem, UT, on this 8th day of January, 2010, to:

Richard K. Glauser
Trevor A. Bradford
1218 East 7800 South, Suite 300
Sandy, UT 84094

Terry Plant
136 East South Temple, Suite 1700
Salt Lake City, UT 84111

_____
Attorney

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1.7

TIME

Date of Crash: Month 02 / Day 28 / Year 07 — Day of Week: S M T W T F S (W) — Military Time: 20:00 — DLD Number:

LOCATION

PLACE WHERE CRASH OCCURRED: 49 COUNTY CODE — City or Town of Jurisdiction: Lindon

If crash was outside city limits indicate distance from city limits or nearest town: ____ Miles N S E W of ____ City or Town

ROAD, STREET, HWY CRASH OCCURRED: I-15 (Street Name or Highway Number) — UDOT USE ONLY

1. AT THE INTERSECTION WITH ____

2. IF NOT AT INTERSECTION 0 Feet N S E W of Geneva Road Structure (Nearest intersection, street, house no., landmark)

2 Tenth of a mile N S E W of Mile Post 273 (Be sure to complete if road has mile post)

Case Number: 060700600

Latitude | Longitude

REPORTABLE CRASH: YES NO

UDOT USE

VEHICLE 1

VIN#	NUMBER	STATE	EXP DATE	COLOR	MAKE	MODEL	YEAR	OCCUPANT(S)
3BKMLD9X26F138638	BF2676	ID	06/07 (mm/yy)	WHI	KW	SEMI	2006 (yyyy)	# 0

DRIVER: FIRST / INITIAL / LAST — STREET, CITY, STATE, ZIP — PHONE

DRIVER LICENSE: STATE / NUMBER / CLASS / ENDORSEMENT(S) / RESTRICTION(S) / DATE OF BIRTH (mm dd yyyy) / AGE / CHARGE(S) (YES NO PENDING UNKNOWN) / CITATION #

OWNER: FIRST / INITIAL / LAST — STREET, CITY, STATE, ZIP — PHONE

Diamond Line Delivery System — Same as Driver — PO Box 938, Meridian ID 83680 — (208) 884-1846

CARRIER: COMMERCIAL VEHICLE INFO / NAME / STREET, CITY, STATE, ZIP / PHONE

Same as Owner — CDL Presented at Scene

US DOT #	CVSA INSPECTION #	GCWR / GVWR (check one)	HAZ MAT RELEASED	HAZ MAT PLACARD # or NAME - CLASS	CARGO CODE	PURPOSE OF USE
387550		10,000 lbs or LESS; 10,001 - 26,000 lbs; MORE THAN 26,000 lbs	YES NO		00	GOVT PERSONAL INTERSTATE INTRASTATE

1ST TRAILER LICENSE PLATE #	STATE	EXP DATE (mm yy)	LENGTH	2ND TRAILER LICENSE PLATE #	STATE	EXP DATE (mm yy)	LENGTH	3RD TRAILER LICENSE PLATE #	STATE	EXP DATE (mm yy)	LENGTH

SPEED	POSTED	POSTED ADVISORY	EST TRAVEL	EST IMPACT	ESTIMATED BY	SEQUENCE OF EVENTS (Codes 01 - 69, 96)	FIRST EVENT	SECOND EVENT	THIRD EVENT	FOURTH EVENT	MOST HARMFUL EVENT For VEHICLE (Use codes 00, 01 - 69)
	65	-	0	0	Officer; Driver; Occupant; Witness; None		19	96	96	96	19

VEHICLE DAMAGE	INSURANCE COMPANY	EFFECTIVE DATE	EXPIRATION DATE	POLICY NUMBER
NO DAMAGE; $1 - $999; $1,000 or MORE	Great West Casualty Co.	10/01/2006	10/01/2007	GWP10136E

INSURANCE APPEARS VALID	AGENCY/AGENT THAT SOLD POLICY	ADDRESS	PHONE
YES NO	Kaufman &Kaufman Insurance	P.O. Box 7873 Boise, ID 83707	

VEHICLE 2

VIN#	NUMBER	STATE	EXP DATE	COLOR	MAKE	MODEL	YEAR	OCCUPANT(S)
JT4RN63R9G0038746	102WXY	UT	05/08 (mm/yy)	RED	TOYT	R6344P	1986 (yyyy)	# 2

DRIVER: FIRST OSCAR / INITIAL / LAST MERCADO — STREET, CITY, STATE, ZIP: 223 N 300 E, Orem Utah 84057 — PHONE (801) 426-4952

DRIVER LICENSE: STATE UT / NUMBER 171212655 / CLASS D / ENDORSEMENT(S) - / RESTRICTION(S) B / DATE OF BIRTH 06/29/64 (mm dd yyyy) / AGE 43 / CHARGE(S) (YES NO PENDING UNKNOWN) / CITATION #

OWNER: FIRST ZARELA / INITIAL / LAST STALLINGS — Same as Driver — STREET, CITY, STATE, ZIP: 49 NO. CAMERON ST., LEHI UT 84043 — PHONE

CARRIER: COMMERCIAL VEHICLE INFO / NAME / STREET, CITY, STATE, ZIP / PHONE

Same as Owner — CDL Presented at Scene

US DOT #	CVSA INSPECTION #	GCWR / GVWR (check one)	HAZ MAT RELEASED	HAZ MAT PLACARD # or NAME - CLASS	CARGO CODE	PURPOSE OF USE
		10,000 lbs or LESS; 10,001 - 26,000 lbs; MORE THAN 26,000 lbs	YES NO			GOVT PERSONAL INTERSTATE INTRASTATE

1ST TRAILER LICENSE PLATE #	STATE	EXP DATE (mm yy)	LENGTH	2ND TRAILER LICENSE PLATE #	STATE	EXP DATE (mm yy)	LENGTH	3RD TRAILER LICENSE PLATE #	STATE	EXP DATE (mm yy)	LENGTH

SPEED	POSTED	POSTED ADVISORY	EST TRAVEL	EST IMPACT	ESTIMATED BY	SEQUENCE OF EVENTS (Codes 01 - 69, 96)	FIRST EVENT	SECOND EVENT	THIRD EVENT	FOURTH EVENT	MOST HARMFUL EVENT For VEHICLE (Use codes 00, 01 - 69)
	65	-	0	0	Officer; Driver; Occupant; Witness; None		97	20	96	96	20

VEHICLE DAMAGE	INSURANCE COMPANY	EFFECTIVE DATE	EXPIRATION DATE	POLICY NUMBER
$1 - $999; NO DAMAGE; $1,000 or MORE	Farmers	10/05/2006	03/19/2007	76170653995

INSURANCE APPEARS VALID	AGENCY/AGENT THAT SOLD POLICY	ADDRESS	PHONE
YES NO			

Work Zone? Yes No Unknown	Total # of Lanes on Roadway 4	Damage to Property Other than Vehicles (Name object and state nature)	
Workers Present? Yes No Unknown	# Vehicles 3 Involved	Name and Address of Owner of Object Struck	Phone ( )
			PROPERTY DAMAGE ESTIMATE: $1,000 OR MORE; LESS THAN $1,000

WITNESSES

Name ____ Address ____ Phone ____

Name ____ Address ____ Phone ____

Law Enforcement Activity

Time Notified of Crash	Arrived at Scene	Date Notified of Crash	Investigation Completed
19:50	20:15	02 / 28 / 07	02 / 28 / 07

Use Military Time — mm dd yy — mm dd yy

Field Diagram: Yes No — Video: Yes No — Photo (s): Yes No; Digital Film

ORIGINAL REPORT — ADDITIONAL PERSONS REPORT — SUPPLEMENTAL REPORT — AMENDED REPORT

State Law Requires a Reportable Crash Report to be Forwarded to Dept. of Public Safety Within 10 Days Following Completion of Investigation.

Mail ORIGINAL REPORT TO: Driver License Division, 4501 South 2700 West, P.O.Box 30560, Salt Lake City, Utah 84130-0560

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TIME

Date of Crash: Month 02 / Day 28 / Year 07

Day of Week: 1 2 3 **X** 5 6 7 — S M T W T F S

Military Time: 20:00

DLD Number:

LOCATION

PLACE WHERE CRASH OCCURRED: 49 COUNTY CODE

City or Town of Jurisdiction: Lindon

If crash was outside city limits indicate distance from city limits or nearest town: ____ Miles ☐N ☐S ☐E ☐W of ____ City or Town

ROAD, STREET, HWY CRASH OCCURRED: I-15 (Street Name or Highway Number)

UDOT USE ONLY

Case Number: 060700600

Latitude / Longitude:

REPORTABLE CRASH: ☒ YES ☐ NO

UDOT USE

1. AT THE INTERSECTION WITH: ____

2. IF NOT AT INTERSECTION 0 Feet ☐N ☒S ☐E ☐W of Geneva Road Structure (Nearest intersection, street, house no., landmark)

2 (Tenth of a mile) ☒N ☐S ☐E ☐W of Mile Post 273 (Be sure to complete if road has mile post)

VEH # 3

VIN#	NUMBER	STATE	EXP DATE (mm/yy)	COLOR	MAKE	MODEL	YEAR	OCCUPANT(S)
1B7GG22N31S252555	224VVR	UT	07/07	AMETHYST	DODG	DAKOTA	2001	# 1

DRIVER

FIRST	INITIAL	LAST	STREET, CITY, STATE, ZIP	PHONE
LINDSEY		HILL	1755 North Bluebird Road, Orem Utah 84097	(801) 225-7544

DRIVER LICENSE

STATE	NUMBER	CLASS	ENDORSEMENT(S)	RESTRICTION(S)	DATE OF BIRTH (mm dd yyyy)	AGE	CHARGE(S)	CITATION #
UT	168723728	D	-	A	11/25/85	21	☐YES ☒NO ☐PENDING ☐UNKNOWN	

OWNER

FIRST / INITIAL / LAST: ☒ Same as Driver — STREET, CITY, STATE, ZIP — PHONE

CARRIER

COMMERCIAL VEHICLE INFO — NAME — STREET, CITY, STATE, ZIP — PHONE

☐ Same as Owner ☐ CDL Presented at Scene

US DOT #	CVSA INSPECTION #	GCWR / GVWR (check one)	HAZ MAT RELEASED	HAZ MAT PLACARD # or NAME - CLASS	CARGO CODE	PURPOSE OF USE
		☐ 10,000 lbs or LESS; ☐ 10,001 - 26,000 lbs; ☐ MORE THAN 26,000 lbs	☐ YES ☒ NO			☐ GOVT ☐ PERSONAL ☐ INTERSTATE ☐ INTRASTATE

1ST TRAILER LICENSE PLATE #	STATE	EXP DATE (mm/yy)	LENGTH	2ND TRAILER LICENSE PLATE #	STATE	EXP DATE (mm/yy)	LENGTH	3RD TRAILER LICENSE PLATE #	STATE	EXP DATE (mm/yy)	LENGTH
		/				/				/	

SPEED	POSTED	POSTED ADVISORY	EST TRAVEL	EST IMPACT	ESTIMATED BY	SEQUENCE OF EVENTS (Codes 01 - 69, 96)	FIRST EVENT	SECOND EVENT	THIRD EVENT	FOURTH EVENT	MOST HARMFUL EVENT For VEHICLE (Use codes 00, 07 - 69)
	65	-	65	20	☐ Officer ☐ Occupant ☐ Witness ☒ Driver ☐ None		20	96	96	96	20

VEHICLE DAMAGE	ESTIMATED DAMAGE	INSURANCE COMPANY	EFFECTIVE DATE	EXPIRATION DATE	POLICY NUMBER
	☒ $1 - $999; ☐ NO DAMAGE; ☐ $1,000 or MORE	OWNERS INSURANCE COMPANY	02/19/2007	03/01/2008	44-324-427-00

INSURANCE APPEARS VALID	AGENCY/AGENT THAT SOLD POLICY	ADDRESS	PHONE
☒ YES ☐ NO			(801) 225-2442

VEH

VIN#	NUMBER	STATE	EXP DATE (mm/yy)	COLOR	MAKE	MODEL	YEAR	OCCUPANT(S)
			/					# 2

DRIVER

FIRST	INITIAL	LAST	STREET, CITY, STATE, ZIP	PHONE

DRIVER LICENSE

STATE	NUMBER	CLASS	ENDORSEMENT(S)	RESTRICTION(S)	DATE OF BIRTH (mm dd yyyy)	AGE	CHARGE(S)	CITATION #
					/ /		☐YES ☐NO ☐PENDING ☐UNKNOWN	

OWNER

FIRST / INITIAL / LAST: ☐ Same as Driver — STREET, CITY, STATE, ZIP — PHONE

CARRIER

COMMERCIAL VEHICLE INFO — NAME — STREET, CITY, STATE, ZIP — PHONE

☐ Same as Owner ☐ CDL Presented at Scene

US DOT #	CVSA INSPECTION #	GCWR / GVWR (check one)	HAZ MAT RELEASED	HAZ MAT PLACARD # or NAME - CLASS	CARGO CODE	PURPOSE OF USE
		☐ 10,000 lbs or LESS; ☐ 10,001 - 26,000 lbs; ☐ MORE THAN 26,000 lbs	☐ YES ☐ NO			☐ GOVT ☐ PERSONAL ☐ INTERSTATE ☐ INTRASTATE

1ST TRAILER LICENSE PLATE #	STATE	EXP DATE (mm/yy)	LENGTH	2ND TRAILER LICENSE PLATE #	STATE	EXP DATE (mm/yy)	LENGTH	3RD TRAILER LICENSE PLATE #	STATE	EXP DATE (mm/yy)	LENGTH
		/				/				/	

SPEED	POSTED	POSTED ADVISORY	EST TRAVEL	EST IMPACT	ESTIMATED BY	SEQUENCE OF EVENTS (Codes 01 - 69, 96)	FIRST EVENT	SECOND EVENT	THIRD EVENT	FOURTH EVENT	MOST HARMFUL EVENT For VEHICLE (Use codes 00, 07 - 69)
					☐ Officer ☐ Occupant ☐ Witness ☐ Driver ☐ None						

VEHICLE DAMAGE	ESTIMATED DAMAGE	INSURANCE COMPANY	EFFECTIVE DATE	EXPIRATION DATE	POLICY NUMBER
	☐ $1 - $999; ☐ NO DAMAGE; ☐ $1,000 or MORE				

INSURANCE APPEARS VALID	AGENCY/AGENT THAT SOLD POLICY	ADDRESS	PHONE
☐ YES ☐ NO			

Work Zone?	Total # of Lanes on Roadway	Damage to Property Other than Vehicles (Name object and state nature)	
☐Yes ☒No ☐Unknown	4		
Workers Present?	**# Vehicles Involved**	**Name and Address of Owner of Object Struck**	**PROPERTY DAMAGE ESTIMATE**
☐Yes ☒No ☐Unknown	3	Phone ( )	☐$1,000 OR MORE ☐LESS THAN $1,000

WITNESSES

Name ____ Address ____ Phone ____

Name ____ Address ____ Phone ____

Law Enforcement Activity

Time Notified of Crash	Arrived at Scene	Date Notified of Crash	Investigation Completed
19:50	20:15	02 / 28 / 07	02 / 28 / 07
Use Military Time		mm dd yy	mm dd yy

Field Diagram ☐Yes ☒No — Video ☐Yes ☒No — Photo (s) ☐Yes ☒No ☐Digital ☐Film

☒ ORIGINAL REPORT ☐ ADDITIONAL PERSONS REPORT ☐ SUPPLEMENTAL REPORT ☐ AMENDED REPORT

State Law Requires a Reportable Crash Report to be Forwarded to Dept. of Public Safety Within 10 Days Following Completion of Investigation.

Mail ORIGINAL REPORT TO: Driver License Division, 60 South 2700 West, P.O.Box 30560, Salt Lake City, Utah 84130-0560

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SEATING POSITION

FRONT

(11)(12)(13) (21)(22)(23) (31)(32)(33) (41)(42)(43) (51)

11 - Motorcycle Driver
21 - Motorcycle Passenger
18 - Front Row Other
28 - Second Row Other
38 - Third Row Other
48 - Fourth Row Other
50 - Sleeper [illegible]on of Cab (Truck)
51 - Enclosed Cargo Area
52 - Unenclosed Cargo Area
54 - Trailing Unit
55 - Riding on Vehicle Exterior
56 - Seating Position 11, Not Driver
57 - Right Side Driver
60 - Non-Motorist
97 - Other*
99 - Unknown

EMS Time Called: EMS Time Arrived:

Disposition of Vehicle # 1: 02 TOWED BY: Larry's Towing

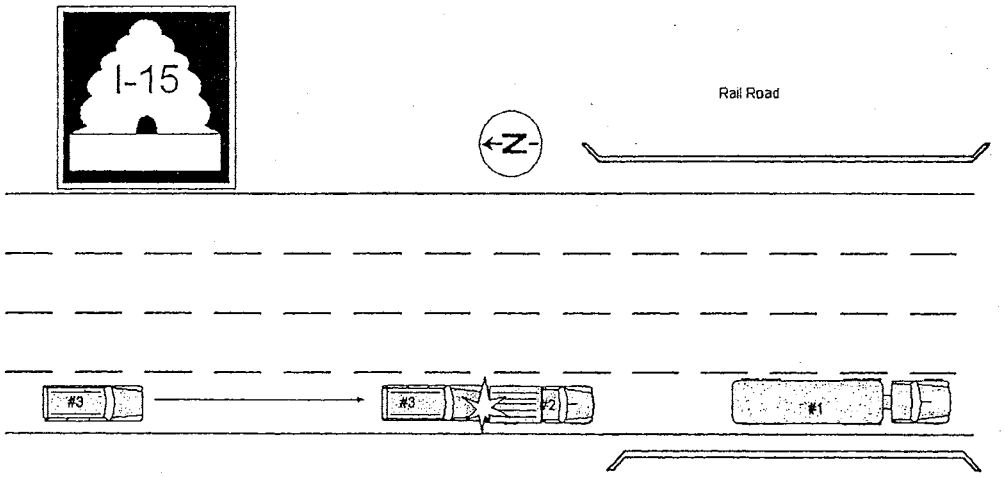
Disposition of Vehicle # 2: 01 TOWED BY:

PERSON(S) INVOLVED

					Person Type	Seating Position	Sex	Level	Area	Cause	Transported By	Safety Equipment	Used Properly	Air Bag	Ejection	Ejection Path	Extrication
VEH #	DRIVER	Transported to:		BAC													
VEH #2	DRIVER	Transported to: -		BAC -	01	11	Male	01	96	96	96	01	01	00	00	96	01
VEH	Name: Quispe, Marcela		DOB	Age	Transported to: -									BAC -			
# 2	Address: 1445 So. 640 E., Orem UT 84097		Phone		02	13		02	03	04	01	01	01	00	00	96	01
VEH	Name: TEAMS, DAVID A		DOB 07/02/1962	Age 44	Transported to:									BAC			
#	Address: 265 North 200 East, Payson Utah 84651		Phone (801) 465-4086		97												
VEH	Name: ,		DOB	Age	Transported to:									BAC			
#	Address:		Phone														
VEH	Name: ,		DOB	Age	Transported to:									BAC			
#	Address:		Phone														

DIAGRAM of CRASH ☐ NO DIAGRAM - Reason: _____ 1. Officer not at scene 2. Vehicles moved 3. Other _____

DLD#



DESCRIBE WHAT HAPPENED
(Refer to Vehicle by Number)

Vehicle one was left abandoned on I-15 in the slow lane. Vehicles two and three were traveling southbound in the slow lane. Vehicle two was able to stop for the parked semi. Vehicle three was unable to stop and struck the back of vehicle two.

David A. Teams is the driver of the semi that was left abandoned on I-15 in the #3 lane, but was not with the vehicle at the time of the collision.

OFFICER'S RANK AND NAME	I.D. #	DEPARTMENT	CASE NUMBER	SUPERVISOR'S APPROVAL	DATE OF REPORT
PRINT Korey R. Wright	249	UHP Section 6	060700600		02/28/2007

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COPY

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY

2009 DEC 24 P 1:45

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Fax:(801) 607-2216
Attorney for Plaintiffs

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

Oscar Mercado and Mercicela Quispe, Plaintiff, Vs. Joshua Stam Defendant.	PLAINTIFFS MOTION and MEMORANDUM TO QUASH OR WITHDRAW ADMISSIONS Case No: 070403371 Judge LAYCOCK

Come now PlaintiffS, by and through counsel of record, and hereby MOVE THE Court to quash or withdraw the admissions deemed against Plaintiffs in this matter.

Fact discovery ended in this matter on April 30, 2009. See Scheduling Order entered December 9, 2008. The requests for admissions were served on August 31, 2009, and on about September 8, 2009. There was no authority for serving this fact discovery on those dates. The requests have not been served when allowed. Plaintiffs have no duty to respond to the requests for admission until they are served within a time period when permitted.

The requests for admissions are not proper. They propose final conclusions of law and

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do not state any specific facts. They are improper under Rule 36, Civ.Proc.

The requests by Defendant DDLDS were sent to the wrong address for counsel, and counsel for DDLDS knew and had used a subsequent address, but failed to use it or the P.O. Box provided by counsel for plaintiffs.

The requests for admissions seek admissions in bad faith. They seek admissions of facts that are false. They violate an insurer's duty to act in good faith.

Plaintiffs incorporate by reference their response to the proposed findings of fact, conclusions of law, and proposed orders of dismiss, and their request for time extensions to respond to summary judgment, and affidavit from counsel, all filed this same day.

Wherefore, Counsel for Plaintiffs prays that the Court quash or withdraw any admissions deemed by operation of law against Plaintiffs.

Respectfully,

Johnson Law Associates

By: /s/ S. Austin Johnson
S. Austin Johnson
Attorney for Plaintiffs

I certify I mailed a copy of this document on this 24th day of December, 2009, from Orem, UT, by US Mail, to:

Terry Plant
136 East South Temple, Suite 1700
Salt Lake City, UT 84111

Trevor A. Bradford
Richard K. Glauser
1218 East 7800 South, Suite 300
Sandy, UT 84094

/s/ S. Austin Johnson
Attorney

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Attorney for Plaintiffs

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY

2009 DEC 24 P 1:46

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

Oscar Mercado and Mercicela Quispe, Plaintiffs, **Vs.** Joshua Stam Defendant.	PLAINTIFFS'OBJECTION TO RULING ON Def. Diamond Line's Motion for Sum Judg Case No: 070403371 Judge LAYCOCK

Comes now S. Austin Johnson and hereby objects to the Court's ruling on Def. Diamond Line's Motion for Sum Judg., filed about December 15, 2009, and to any subsequent Proposed Findings of Fact, Conclusions of Law, and Order of Dismissal tendered by the same defendant.

Plaintiffs object because the ruling is erroneous as a matter of law. The order granting summary judgment should be stricken because the motion was sent to an incorrect address. Counsel for Plaintiff moved from the address where all the documents were sent on February 1, 2009. The motion and requests for admissions were not timely delivered to counsel for plaintiffs.

Also, the proposed order, findings and conclusions are completely based on false, improper and misleading arguments that have been advanced in bad faith. First, the order relies upon requests for admissions served on September 8, 2009. There was no authority for these requests for admissions to be served. Rule 36(a)(1), and 26(d), set time limits on when these requests may be served. The time period subjects the parties to the time periods in the rules, the scheduling order, stipulations by the

53

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parties or orders of the court. The parties rights to discovery were restricted by the scheduling order. The only scheduling order in place on September 2, 2009, was entered on December 9, 2008. This scheduling order provided that "Fact Discover is to be completed by **April 30, 2009."** There was no permission to engage in discovery outside that provided by the scheduling order. The requests for admissions could not be served until there was a new order in place that would permit this discovery. A new scheduling order was entered on October 1, 2009. But this order could not authorize the requests for admissions because they were already improperly served. The requests must be stricken.

Second, the requests for admissions are impermissible because they seek admissions concerning legal conclusions. The requests seek admissions that the driver who caused the accident was "not at fault for the accident," and "not responsible for the accident." Whether Defendant Hill has fault or responsibility is a legal conclusion. It is an improper admission. Rule 36, U.Civ.Prov., provides that admissions may only be served that "relate to statements or opinions of fact or of the application of law to fact." These admissions clearly require legal definitions of fault and responsibility. They request ultimate legal conclusions. This admission is not within the scope of permissible admissions.

Third, the requests for admissions should be withdrawn. Rule 36(b), U.Civ.Proc., provides that "the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits." Defendant Hill cannot allege, and has not claimed any prejudice from withdrawal of the admissions because they seek admissions that are false. The defendant, in bad faith, seeks to impose falsity by gamesmanship, instead of seeking a just result. Counsel for plaintiffs made a motion on this same day and it should be granted.

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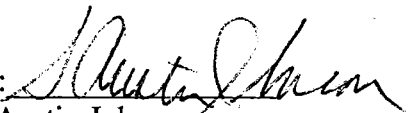
Fourth, Counsel has also requested additional time to respond to the motion to summary judgment. He attached an affidavit to that motion. It was filed this same day. This motion should be granted.

Fifth, counsel for defendant acted in bad faith in serving requests for admissions when not entitled to do so, and in going forward with this motions based on false and improper requests for admissions.

Wherefore, Plaintiffs pray this Court deny the proposed findings of fact and conclusions of law.

Respectfully,

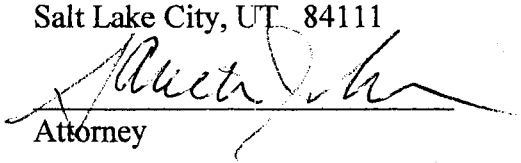
Johnson Law Associates

By: 
S. Austin Johnson
Attorney for Plaintiffs

I certify I sent a copy of this document by U.S. mail, from Orem, UT, on this 24th day of December, 2009, to:

Richard K. Glauser
Trevor A. Bradford
1218 East 7800 South, Suite 300
Sandy, UT 84094

Terry Plant
136 East South Temple, Suite 1700
Salt Lake City, UT 84111


Attorney

55

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COPY

S. Austin Johnson, Esq. (USB# 5169)
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Attorney for Plaintiffs

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY

2009 DEC 24 P 1:46

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

Oscar Mercado and Mercicela Quispe, Plaintiffs, Vs. Joshua Stam Defendant.	PLAINTIFFS RESPONSE TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF DISMISSAL Submitted by Defendant Hill Case No: 070403371 Judge LAYCOCK

Comes now S. Austin Johnson and hereby objects to the Proposed Findings of Fact, Conclusions of Law, and Order of Dismissal filed by Defendant Lindsay Hill.

Plaintiffs object because the proposed order, findings and conclusions are completely based on false, improper and misleading arguments that have been advanced in bad faith. First, the order relies upon requests for admissions served on September 2, 2009. There was no authority for these requests for admissions to be served. Rule 36(a)(1), and 26(d), set time limits on when these requests may be served. The time period subjects the parties to the time periods in the rules, the scheduling order, stipulations by the parties or orders of the court. The parties rights to discovery were restricted by the scheduling order. The only scheduling order in place on September 2, 2009, was entered on December 9, 2008. This scheduling order provided that "Fact Discover is to be completed by **April 30, 2009."** There was no permission to engage in discovery outside that provided by the scheduling order. The requests for admissions could not be served until there was a new order in place that would permit this

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discovery. A new scheduling order was entered on October 1, 2009. But this order could not authorize the requests for admissions because they were already improperly served. The requests must be stricken.

Second, the requests for admissions are impermissible because they seek admissions concerning legal conclusions. The requests seek admissions that the driver who caused the accident was "not at fault for the accident," and "not responsible for the accident." Whether Defendant Hill has fault or responsibility is a legal conclusion. It is an improper admission. Rule 36, U.Civ.Prov., provides that admissions may only be served that "relate to statements or opinions of fact or of the application of law to fact." These admissions clearly require legal definitions of fault and responsibility. They request ultimate legal conclusions. This admission is not within the scope of permissible admissions.

Third, the requests for admissions should be withdrawn. Rule 36(b), U.Civ.Proc., provides that "the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits." Defendant Hill cannot allege, and has not claimed any prejudice from withdrawal of the admissions because they seek admissions that are false. The defendant, in bad faith, seeks to impose falsity by gamesmanship, instead of seeking a just result.

1. Plaintiffs object to proposed finding of fact " DFF" 1 because the Requests for Admissions were improper. The scheduling order was entered on December 8, 2008. It provided that fact discovery ended on April 30, 2009. There was no scheduling order in place that allowed service of the requests for admissions on August 31, 2009 The requests for admissions were not properly served because they were not allowed by law.
2. Plaintiffs object to DDF 2, DDFF 3, DFF 4, because Plaintiffs did not have to respond to the requests for admissions because they were improperly served when not permitted by the

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scheduling order. Plaintiffs did not have to respond by October 5, 2009, because they did not have 30 days to respond after permissible requests for admissions were served.

3. The DFF 5 and 6 cannot be adopted as fact. The motion for summary judgment is improper because it relies upon requests for admissions that were improper. The Court, in its ruling, held that based on the requests for admissions, it had to grant summary judgment. Likewise, without the requests for admissions it cannot grant summary judgment.
4. The conclusions of law herein called " DCL" 1 is wrong. The requests for admissions cannot be deemed admitted when they are not allowed by the scheduling order.
5. DCL II, IV is improper because the proposed conclusions are absolutely false. Defendant Hill caused a rear-end collision on Interstate I-15. How can she have no fault when she hits the car in front of her. She obviously failed to keep a proper lookout and was driving to closely. See the police report, attached hererto. In addition, it is totally improper because the conclusion relies upon requests for admissions that should be stricken because they were served without authority.
6. DCL III, V are improper because the requests for admissions can have no legal effect if they are stricken and improper. Improper requests for admissions cannot refute truth. The truth is that Defendant Hill caused the accident by hitting Plaintiffs' vehicle from behind on Interstate 15.
7. DCVI should be denied because there clearly is a material question of fact on the percentage of fault of Defendant Hill. She is not entitled to judgment as a matter of law.
8. DC VII is erroneous. The case against Defendant Hill cannot be dismissed because the requests for admissions cannot be deemed an admission.

Wherefore, Plaintiffs pray this Court deny the proposed findings of fact and conclusions of law.

Respectfully,

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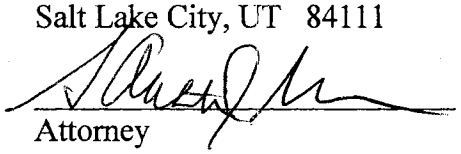
Johnson Law Associates

By: 
S. Austin Johnson
Attorney for Plaintiffs

I certify I sent a copy of this document by U.S. mail, from Orem, UT, on this 24th day of December, 2009, to:

Richard K. Glauser
Trevor A. Bradford
1218 East 7800 South, Suite 300
Sandy, UT 84094

Terry Plant
136 East South Temple, Suite 1700
Salt Lake City, UT 84111


Attorney

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Orem, UT 84097
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Fax:(801) 607-2216
Attorney for Plaintiffs

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

Oscar Mercicela Quispe, Plaintiff, Vs. Joshua Stam Defendant.	PLAINTIFFS RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND MOTION FOR EXTENSION OF TIME TO RESPOND Case No: 070403371 Judge LAYCOCK

Come now PlaintiffS, by and through counsel of record, and hereby respond to the Motion for Summary Judgment and request additional time to answer the motion.

The motion should be denied because it falsely states that there are no genuine issues of material fact as to negligence. Rule 56 provides that material fact issues may arise in the depositions, answers to interrogatories, or admissions on file. Defendant Diamond Delivery System fails to inform the Court that plaintiffs have submitted to at least 12 hours of depositions. For example, attached find two notices of depositions. Plaintiffs have answered interrogatories. They have produced documents in response to requests for production. Counsel for defendant ignores the facts established in these parts of the record. He does not even mention that these

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facts exist or those events took place. The issues of fact clearly assert that Plaintiffs were not at fault in causing the accident. They stopped on the freeway because defendant left his tractor and trailer in the middle of the traffic in the nighttime. Plaintiffs were hit immediately from behind as they came to a stop to avoid hitting defendant. Defendant left the truck and trailer in the lane of traffic because it ran out of gas. The driver was clearly negligent in failing to gas up before continuing on the interstate.

The requests for admissions are inappropriate. They ask for admissions on factual conclusions such as proximate cause, fault and even negligence. These conclusions are derived after the law is described and then specific facts are applied to the law. It is totally inappropriate to assert admissions on such conclusions without providing the legal framework and specific facts from which such conclusions could be derived. The failure to answer the requests for admissions cannot be the basis of establishing conclusions of fact for the case.

Finally, Plaintiffs need additional time to answer the motion for summary judgment. Their depositions have never been completed. They have attended at least three separate days of depositions. But the depositions were not completed. No transcript has been provided to Plaintiffs. Counsel needs time to obtain the transcripts so as to show the material fact issues that have been established in the discovery.

Wherefore, Counsel for Plaintiffs prays that he be given time to answer the motion for summary judgment after depositions have been completed and transcripts obtained. Further, the motion should be denied because it ignores the factual issues that exist in the record by ignoring all discovery that has been completed. Finally, failure to answer the admissions is not sufficient basis for summary judgment because the requested admissions are legally inappropriate.

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Respectfully,

Johnson Law Associates

By:_____
S. Austin Johnson
Attorney for Plaintiffs

I certify I mailed a copy of the Plaintiffs Response to the motion for summary judgment on this 25th day of November, 2009, from Orem, UT, by US Mail, to:

Terry Plant
136 East South Temple, Suite 1700
Salt Lake City, UT 84111

_____
Attorney

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S. Austin Johnson, Esq. (USB# 5169)
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639 South Riverbreeze Dr
P.O. Box 970880
Orem, UT 84097-0880
Tel: (801) 426-7900
Fax:(801) 607-2216
Attorney for Plaintiffs

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

Oscar Mercado and Mercicela Quispe, Plaintiff, Vs. Joshua Stam Defendant.	PLAINTIFFS REQUEST TO CONTINUE TIME PERIOD TO RESPOND TO MOTIONS FOR SUMMARY JUDGMENT Case No: 070403371 Judge LAYCOCK

Come now PlaintiffS, by and through counsel of record, and hereby request additional time to respond to the Motions for Summary Judgment. Defendant Hill filed a motion for summary judgment on October 23, 2009. Defendant Diamond Line Delivery Systems ("DDLDS") filed a motion on October 28, 2009.

Rule 56,(f), U.Civ.P., provides that a party opposing the motion for summary judgment may request additional time to respond. The court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had. This motion is supported by the Affidavit of Counsel, attached hereto. Part

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of the reason for this request for extension of time is because Counsel moved his office on November 1, 2009, to 575 South State Street, Orem, UT. The motion for DDLDS was sent to the wrong address and counsel did not have it by the time in which he should have responded. The move caused counsel to miss the deadline for responding to Defendant Hill. But it, with the other circumstances of the abuse of the discovery process and total lack of merit in the motion, constitute good cause to allow this extension of time to respond to the motion.

This motion is timely. The motion for summary judgment may be granted if it shows there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), Ut.Civ.P. Defendants have failed to show there is no genuine issue of fact. Summary judgment cannot be granted. The Court lacks legal power to grant it if the motion, alone, fails to show there is no issue of fact. The argument of the absence of a fact issue, only presented in bad faith, clearly disappears when the admissions to the requests for admissions are withdrawn or quashed. The clear fact issue will be so obvious when Plaintiffs respond to the motion for summary judgment.

Wherefore, Counsel for Plaintiffs prays for a continuance of the period in which they may respond to the motion for summary judgment.

Respectfully,

Johnson Law Associates

By:_____
S. Austin Johnson
Attorney for Plaintiffs

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I certify I mailed a copy of the Plaintiffs Response to the motion for summary judgment on this 25th day of November, 2009, from Orem, UT, by US Mail, to:

Terry Plant
136 East South Temple, Suite 1700
Salt Lake City, UT 84111

Trevor A. Bradford
Richard K. Glauser
1218 East 7800 South, Suite 300
Sandy, UT 84094

_____
Attorney

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Tel: (801) 426-7900
Fax:(801) 607-2216
Attorney for Plaintiffs

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

Oscar Mercado and Mercicela Quispe, Plaintiff,	)	AFFIDAVIT IN SUPPORT OF PLAINTIFFS REQUEST TO CONTINUE TIME PERIOD TO RESPOND TO MOTIONS FOR SUMMARY JUDGMENT
Vs.	)	
Joshua Stam	)	Case No: 070403371
Defendant.	)	Judge LAYCOCK

Come now S. Austin Johnson, Counsel for Plaintiffs, and hereby states the following to be true and correct, under penalty of perjury under the laws of the State of Utah:

1. Counsel cannot present facts sufficient to justify his clients' opposition to the motion for summary judgment for the following reasons:
   a. Defendants have taken at least 12 hours of depositions of plaintiffs. Plaintiffs do not have copies of those transcripts because the depositions have not been completed, but were continued by counsel for defendants.
   b. Plaintiff Oscar contacted counsel in early December 2009, and indicated they

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were going to Peru for the holidays. They are not available to execute an affidavit to set for the facts concerning fault and their injuries.

c. The motion from Defendant Diamond Lines Delivery Systems was sent to an incorrect address for counsel for Plaintiffs. Counsel moved from 345-B East University Pkwy, Orem, UT, on February 1, 2009. Defendant DDLDS knew, as shown by correspondence from it, dated May 29, 2009. See attached DDLDS Designation of Lay Witnesses, filed 6/1/09.

d. My office was at 251 River Park Drive, Provo, UT, from February 1, 2009, to June 15, 2009. Then, I attempted a home office until November 1, 2009. I moved into a new office on November 1 to 8, 2009, at 575 South State Street, Orem, UT. But when the owner finally agreed to present me a copy of the lease on about December 1, 2009, he requested that I leave because he had rented the entire floor of offices to one tenant and he was undertaking remodeling immediately.

e. I moved into my new office at 359 East 1200 South, Orem, UT, on December 8, 2009.

f. I missed deadlines to respond to the motions for summary judgment because my files, staff and mail were scattered, misplaced, or not timely received.

g. Discovery deadlines ended on April 30, 2009. Counsel could not agree to extend the scheduling order as it was because it did not extend any of the deadlines that had already passed, even though all counsel wanted to continue

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discovery deadlines. Such an extension had to include extending all other deadlines that built on the completion of fact discovery. These deadlines were never addressed by any proposed orders by counsel for Defendant Hill.

Respectfully,

I declare the above facts to be true and correct, under penalty of perjury on this 24th day of December, 2009.

By:_____
S. Austin Johnson
Attorney for Plaintiffs

I certify I mailed a copy of this document from from Orem, UT, by US Mail, on 12/24/2009, to:

Terry Plant
136 East South Temple, Suite 1700
Salt Lake City, UT 84111

Trevor A. Bradford
Richard K. Glauser
1218 East 7800 South, Suite 300
Sandy, UT 84094

_____
Attorney

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APPENDIX 3

Scheduling orders

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Trevor A. Bradford, #10233
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Telephone: (801) 562-5555
Facsimile: (801) 562-5510
Attorneys for Defendant Lindsey Hill

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

OSCAR MERCADO and MARICELA QUISPE, Plaintiffs, v. DIAMOND LINE DELIVERY SYSTEM and LINDSEY HILL, Defendants.	**STIPULATED DISCOVERY PLAN AND ORDER** Case No.: 070403371 Judge Claudia Laycock

The parties propose the following scheduling dates in the above-entitled matter.

STIPULATED DISCOVERY PLAN

Discovery is required on each of the issues claimed by Plaintiffs and the defenses asserted by Defendant in their respective pleadings. Pursuant to the Utah Rules of Civil Procedure, counsel have prepared the following proposed Stipulated Discover Order:

A. **Initial Disclosures**: The parties are to exchange the information required by Rule 26(a)(1) by **December 15, 2008**.

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B. **Discovery Completion Dates, Lay Witness Designation:**

1. Fact Discovery is to be completed by **April 30, 2009.**

2. Plaintiffs shall designate lay witnesses by **March 30, 2009.**

3. Defendants shall designate lay witnesses by **April 30, 2009.**

C. **Expert Disclosures:**

1. Plaintiffs shall disclosure their expert(s) and provide expert(s), as required by Rule 26(a)(3), by **June 1, 2009.**

2. Defendants shall disclosure their expert(s) and provide expert(s), as required by Rule 26(a)(3), by **July 1, 2009.**

3. Defendants' rebuttal expert(s) disclosure and reports required by Rule 26(a)(3) are due by **August 1, 2009.**

4. Plaintiffs' rebuttal expert(s) disclosure and reports required by Rule 26(a)(3) are due by **September 1, 2009.**

D. **Deposition of Expert Witnesses**: Depositions by Expert Witnesses are to be completed by **November 1, 2009.**

E. **Supplementation of Disclosures:** The parties are to exchange supplemental disclosures required by Rule 26(a) as the rules require.

F. **Pretrial Disclosures**: The parties are to exchange pretrial disclosures, required by Rule 26(a)(4) except as otherwise provided herein.

G. **Methods of Discovery**: The parties may obtain discovery by all methods allowed by the Utah Rules of Civil Procedure and by subpoena.

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H. **Discovery Scope:** Discovery is necessary on the following subjects: All issues of all causes of action, including liability and damage issues.

I. **Utah R. Civ. P. 16(b) Scheduling and Management Conference and Orders**:

1. All parties to this matter must be joined, and amendments to the pleadings shall be filed on or before **April 30, 2009.**

2. All dispositive motions and motions to those to extend discovery (except in motions in-limine), shall be filed on or before **December 1, 2009.**

J. **Trial Dates, Conferences, and Modifications**: The date or dates for conferences before trial, a final pretrial conference and trial date will be set by the Court upon submission of appropriate motions.

K. **Possibilities of Settlement**

The parties agree that the possibility of settlement at this time is uncertain, pending further discovery.

ORDER

IT IS HEREBY ORDERED, that the above-stipulated discovery plan is adopted and will be the scheduling order of the Court in this matter.

DATED this _____ day of December, 2008.

BY THE COURT:

_____

Honorable Claudia Laycock

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2

Approved as to form:

SMITH & GLAUSER, P.C.

RICHARD K. GLAUSER
TREVOR A. BRADFORD
Attorneys for Defendant Hill

JOHNSON LAW ASSOCIATES

_____

S. AUSTIN JOHNSON
Attorney for Plaintiff

PLANT, CHRISTENSEN & KANELL

_____

Terry M. Plant
Attorneys for Defendant Diamond Line Delivery System

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OCT 01 2009
4th DISTRICT
STATE OF UTAH
UTAH COUNTY

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Telephone: (801) 562-5555
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Attorneys for Defendant Lindsey Hill

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

OSCAR MERCADO and MARICELA QUISPE, Plaintiffs, v. DIAMOND LINE DELIVERY SYSTEM and LINDSEY HILL, Defendants.	**SECOND AMENDED DISCOVERY PLAN AND ORDER** Civil Case No.: 070403371 Judge Claudia Laycock

DISCOVERY PLAN

In accordance with the *Utah Rules of Civil Procedure*, counsel for Defendant Hill has prepared this "Second Amended Discovery Plan and Order." Discovery is required on each of the issues claimed by Plaintiffs and the defenses asserted by Defendants in their respective pleadings. (The court also grants the defendant Hill's unopposed Motion for Entry of Scheduling Order.) cc

I. **Discovery Completion Dates, Lay Witness Designation:**

A. Fact discovery is to be completed by **December 31, 2009.**

B. Plaintiffs shall designate lay witnesses by **August 30, 2009.**

C. Defendants shall designate lay witnesses by **October 30, 2009.**

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II. **Expert Disclosures:**

A. Pursuant to Rule 26(a)(3) (2009), Plaintiffs shall disclosure their expert(s) and provide expert(s) report(s) by **January 29, 2010.**

B. Pursuant to Rule 26(a)(3) (2009), Defendants shall disclosure their expert(s) and provide expert(s) report(s) by **February 28, 2010.**

C. Pursuant to Rule 26(a)(3) (2009), Defendants' rebuttal expert(s) disclosure and reports are due by **March 31, 2010.**

D. Pursuant to Rule 26(a)(3) (2009), Plaintiffs' rebuttal expert(s) disclosure and report(s) are due by **April 30, 2010.**

III. **Deposition of Expert Witnesses:** Depositions by Expert Witnesses are to be completed by **May 28, 2010.**

IV. **Supplementation of Disclosures:** The parties are to exchange supplemental disclosures required by Rules 26(a) and 26(e) (2009) as the rules require.

V. **Pretrial Disclosures**: The parties are to exchange pretrial disclosures, required by Rule 26(a)(4) (2009) except as otherwise provided herein.

VI. **Methods of Discovery**: The parties may obtain discovery by all methods allowed by the *Utah Rules of Civil Procedure* and by subpoena.

VII. **Discovery Scope:** Discovery is necessary on the following subjects: All issues of all causes of action, including liability and damage issues.

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VIII. Utah R. Civ. P. 16(b) Scheduling and Management Conference and Orders:

A. All parties to this matter must be joined, and amendments to the pleadings shall be filed on or before **October 30, 2009.**

B. All dispositive motions and motions to extend discovery (except in motions in-limine), shall be filed on or before **June 30, 2010.**

IX. **Trial Dates, Conferences, and Modifications**: The date or dates for conferences before trial, a final pretrial conference and trial date will be set by the Court upon submission of appropriate motions.

X. **Possibilities of Settlement**

The parties agree that the possibility of settlement at this time is uncertain, pending further discovery.

ORDER

IT IS HEREBY ORDERED that the above discovery plan is adopted and will be the scheduling order of the Court in this matter.

IT IS FURTHER ORDERED that Plaintiffs and/or Plaintiffs counsel S. Austin Johnson will pay Defendant Hill's reasonable attorneys' fees and costs to bring the "Motion for Entry of Scheduling Order," which is within the Court's discretion and authority pursuant to Rule 37(b)(2) and 37(e) of the *Utah Rules of Civil Procedure*.

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DATED this 29th day of Sep, 2009.

BY THE COURT:

ORIGINAL IF IN RED INK
STATE OF UTAH
FOURTH DIST. COURT • UTAH COUNTY

Claudia Laycock

HONORABLE CLAUDIA LAYCOCK

case no. 0704

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APPENDIX 4

Court Ruling

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FILED
JUN 11 2010
4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

Prepared by:
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Trevor A. Bradford, Bar #10233
SMITH & GLAUSER, P.C.
1218 East 7800 South, Suite 300
Sandy, Utah 84094
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tab@smithglauser.com
Attorneys for Defendant Lindsey Hill

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

OSCAR MERCADO and MARICELA QUISPE, Plaintiffs, v. DIAMOND LINE DELIVERY SYSTEMS and LINDSEY HILL, Defendants.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF DISMISSAL** Judge: CLAUDIA LAYCOCK Civil Case No.: 070403371

Defendant Lindsey Hill served Plaintiffs her *Motion for Summary Judgment* and supporting memorandum on or about October 21, 2009. Plaintiffs time for response elapsed on November 9, 2009, and Plaintiffs did not file a response.

Defendant Hill filed a request to submit for decision with the Court on her *Motion for Summary Judgment* on or about November 16, 2009. The Court reviewed Defendant Hill's *Motion for Summary Judgment* and supporting memorandum and found the motion well-

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taken. The Court granted Defendant Hill's *Motion for Summary Judgment* on or about December 7, 2009.

On or about December 24, 2009, Plaintiffs filed various motions essentially seeking to set aside the Court's grant of summary judgment in favor of Defendant Hill. The Court has now ruled on Plaintiffs' various motions and denied all the motions.

Therefore, the Court now makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Defendant Hill served Requests for Admissions on Plaintiffs on August 31, 2009. The Certificate of Service indicates that the Requests for Admissions were properly served upon Plaintiffs' counsel, by mailing, at PO Box 970880 in Orem, Utah (the "PO Box address").
2. Plaintiffs had until October 5, 2009, to respond to the requests for admissions, but failed to do so.
3. The Requests for Admissions sent to Plaintiff Oscar Mercado ask him to admit: (A) that Defendant Hill was not at fault for the accident; (B) that Defendant Hill is not responsible for the accident; (C) that Oscar Mercado was at fault for the accident; and (D) that Oscar Mercado was not significantly injured in the accident.
4. The Requests for Admissions sent to Plaintiff Maricela Quispe ask her to admit: (A) that Defendant Hill was not at fault for the accident; (B) that Defendant Hill is not

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responsible for the accident; (C) that Oscar Mercado was at fault for the accident; and (D) that Maricela Quispe was not significantly injured in the accident.

5. Defendant Hill's *Motion for Summary Judgment* and supporting memorandum was served upon Plaintiffs on October 21, 2009, at the PO Box address.

6. Plaintiffs time to respond to Defendant Hill's *Motion for Summary Judgment* elapsed on November 9, 2009, and Plaintiffs failed to respond.

7. Defendant Hill served Plaintiffs with a request to submit for decision on her *Motion for Summary Judgment* on November 13, 2009, at the PO Box address, to which Plaintiffs did not respond.

8. On December 7, 2009, the court issued a ruling on Defendant Hill's *Motion for Summary Judgment*, which granted Hill's motion because plaintiffs had failed to respond to Defendant Hill's requests for admissions. In granting Defendant Hill's *Motion for Summary Judgment*, the court found that there were no undisputed material facts.

9. On or about December 24, 2009, Plaintiffs filed various motions essentially seeking to set aside the Court's grant of summary judgment in favor of Defendant Hill. The Court has ruled on Plaintiffs' various motions and denied all the motions.

CONCLUSIONS OF LAW

I. Under Rule 36 of the *Utah Rules of Civil Procedure* "matters shall be deemed admitted unless said request is responded to within 30 days after service of the request." Utah R. Civ. P. 36(a)(1) (2009).

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II. Since Plaintiff Oscar Mercado failed to respond to Defendant Hill's Requests for Admissions within the time allotted by the *Utah Rules of Civil Procedure*, these requests are deemed admitted for purposes of this litigation, including the facts that: (A) Defendant Hill was not at fault for the accident; and (B) that Defendant Hill is not responsible for the accident.

III. The legal effect of these admissions is that Defendant Hill is not liable for the automobile accident in which Plaintiff Oscar Mercado was involved at issue in this litigation.

IV. Since Plaintiff Maricela Quispe failed to respond to Defendant Hill's Requests for Admissions within the time allotted by the *Utah Rules of Civil Procedure*, these requests are deemed admitted for purposes of this litigation, including the facts that: (A) Defendant Hill was not at fault for the accident; and (B) that Defendant Hill is not responsible for the accident.

V. The legal effect of these admissions is that Defendant Hill is not liable for the automobile accident in which Plaintiff Maricela Quispe was involved at issue in this litigation.

VI. In light of these admissions, and in consequence of the fact that Defendant Hill is not liable for the Plaintiffs' auto accident, there is no genuine issue as to any material fact and Defendant Hill is entitled to a judgment as a matter of law.

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VII. Defendant Hill is entitled to have the Plaintiffs' case against her dismissed because Plaintiffs have admitted, by failing to timely response to Defendant Hill's requests for admissions, that Defendant Hill was not at fault for Plaintiffs' auto accident.

ORDER

IT IS HEREBY ORDERED that Defendant Hill's *Motion for Summary Judgment* is granted. IT IS FURTHER ORDERED that Plaintiffs' case against Defendant Hill is dismissed with prejudice.

DATED this 11th day of June, 2010.

DISTRICT COURT JUDGE

Claudia Laycock

JUDGE CLAUDIA LAYCOCK
Fourth District Court

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed this 14th day of June, 2010, a correct copy of the foregoing document to the following:

S. Austin Johnson
JOHNSON LAW ASSOCIATES
P.O. Box 970880
Orem, UT 84097
Attorneys for Plaintiffs

S. Austin Johnson
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Orem, UT 84058
Attorneys for Plaintiffs

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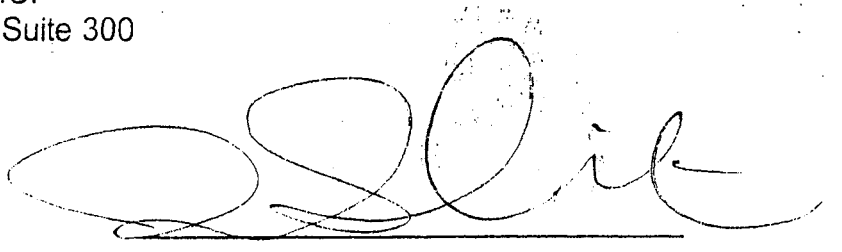
Jeremy M. Seeley
PLANT, CHRISTENSEN & KANELL
136 E. South Temple, #1700
Salt Lake City, Utah 84111
Attorneys for Defendant Diamond Line Delivery

Richard K. Glauser
Trevor A. Bradford
SMITH & GLAUSER, P.C.
1218 East 7800 South, Suite 300
Sandy, Utah 84094



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CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed this 3rd day of June, 2010, a correct copy of the foregoing document to the following:

S. Austin Johnson
JOHNSON LAW ASSOCIATES
P.O. Box 970880
Orem, UT 84097
Attorneys for Plaintiffs

S. Austin Johnson
JOHNSON LAW ASSOCIATES
359 E. 1200 S.
Orem, UT 84058
Attorneys for Plaintiffs

Terry Plant
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Attorneys for Defendant Diamond Line Delivery

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COPY

FILED
JUN 11 2010
4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

OSCAR MERCADO and MARICELA QUISPE, Plaintiffs, v. DIAMOND DELIVERY LINES and LINDSEY HILL, Defendants.	**RULING ON PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENTS ENTERED ON JANUARY 25, 2010** CASE NO. 070403371 DATE: 11 June 2010 Judge Claudia Laycock Division 3

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Office of
Professional Conduct

This matter comes before the court upon submission of *Plaintiffs' Motion To Alter or Amend Judgments Entered on January 25, 2010.* This motion is one of several in which the plaintiffs seek to escape the consequences of their failure to respond to the defendants' requests for admissions, motions for summary judgment, and the court's ruling on those motions for summary judgment.[1] Because the grounds for this motion do not differ in any material respect from the grounds used in the other motions, the court will include the following *Procedural Facts*, taken *ver batim* from the court's *Ruling on Plaintiffs' Motion to Quash or Withdraw Admissions*.

PROCEDURAL FACTS

1. On November 15, 2007 Oscar Mercado and Maricela Quispe ("plaintiffs") filed

[1]On May 5, 2010 the court entered its *Ruling on Plaintiffs' (1) Request for Hearing and (2) Request to Continue Time Period to Respond to Motions for Summary Judgment and (3) Mr. Johnson's Rule 56(f) Affidavit.* On May 14, 2010 the court entered its *Ruling on Plaintiffs' Motion to Quash or Withdraw Admissions.*

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their complaint against Lindsey Hill ("Hill") and Diamond Line Delivery System ("Diamond"). The plaintiffs' attorney was and still is S. Austin Johnson ("Mr. Johnson"). At that time he listed his mailing address as 345-B East University Parkway in Orem, Utah ("the Parkway address").

2. On November 3, 2008 the court ruled in a memorandum decision on Hill's *Motion to Dismiss or Alternatively to Compel Production of Documents*, granting the unopposed motion.

3. On December 8, 2008 the court signed and entered the parties' *Stipulated Discovery Plan and Order*, in which the parties agreed that fact discovery would be completed by April 30, 2009.

4. According to Mr. Johnson's Rule 56(f) affidavit ("Mr. Johnson's Rule 56(f) Affidavit"), which was attached to the plaintiffs' *Request to Continue Time Period to Respond to Motions for Summary Judgment* (filed on December 24, 2009), Mr. Johnson moved from the Parkway address to 251 West Riverpark Drive, Suite 100, Provo ("the Riverpark address") on February 1, 2009.

5. On February 20, 2009 Diamond filed its *Notice of Deposition of Plaintiffs*. The attached mailing certificate used the following address for Mr. Johnson: 251 West Riverpark Drive, Suite 100, Provo. This was the first time that this new address for Mr. Johnson appeared in the court's file.

6. On May 13, 2009 and May 29, 2009 Hill sent a proposed amended discovery plan and order to Mr. Johnson at the Riverpark address. Mr. Johnson did not respond to either mailing, nor did he file an objection with the court.

7. By June 1, 2009, when Hill filed her *Lay Witness Designations*, both defendants

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were mailing documents to Mr. Johnson at the Riverpark address. The court file does not contain a notice of change of address for Mr. Johnson as of June 1, 2009.

8. Discovery was clearly occurring in June and July 2009. The defendants filed various notices during those months, including (1) a notice of the deposition of defendant Hill by Diamond,[2] (2) a notice of the deposition of David Teams by Hill, and (3) Diamond's first set of interrogatories to Hill. Mr. Johnson did not file any objections to this ongoing discovery, all of which occurred after the April 30, 2009 discovery cut-off date.

9. According to Mr. Johnson's Rule 56(f) Affidavit, on June 15, 2009 he left the Riverpark Drive location and "attempted a home office until November 1, 2009." His affidavit does not provide his home address, nor did he ever provide his home address to the court or to opposing counsel.

10. On August 10, 2009 Hill filed a *Motion for Entry of Scheduling Order*, seeking to have the court enter the proposed *Second Amended Stipulated Discovery Plan and Order*. Hill alleged that both defendants' attorneys had signed the proposed order, but that Mr. Johnson had not, despite numerous attempts by Hill's attorney to accomplish that goal. The mailing certificate which accompanied the motion and its memoranda had the following notation for Mr.

---

[2]This notice was sent to the Riverpark address, but was returned on July 29, 2009 to Diamond as undeliverable. The post office's attached sticker noted the following:
RETURN TO SENDER:
JOHNSON LAW OFFICE
MOVED LEFT NO ADDRESS
UNABLE TO FORWARD
RETURN TO SENDER.
See Exhibit A to Diamond's opposition memorandum.

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Johnson's address: "No current address." As of August 10, 2009, when this motion and order were filed, the court had not received a notice of change of address from Mr. Johnson.

11. On or about August 11, 2009 Trevor A. Bradford, counsel for Defendant Hill, obtained a current address for Mr. Johnson from the Utah State Bar, which was PO Box 970880 in Orem, Utah (the "PO Box address").

12. On September 2, 2009 Hill filed her certificate of service for its *First Set of Requests for Admission to Plaintiffs*, mailing the requests to Mr. Johnson at the PO Box address on August 31, 2009. The plaintiffs' response was due on Monday, October 5, 2009, but the plaintiffs did not respond.

13. On September 8, 2009 Diamond filed its certificate of service for its *First Set of Requests for Admission to Plaintiffs*, mailing the requests to Mr. Johnson at the Parkway address on September 4, 2009. Apparently, Diamond had not yet discovered the PO Box address and reverted back to the Parkway address as the last-known successful address. Again, the court was not apprised of this new address. The plaintiffs' response was due on Wednesday, October 7, 2009, but the plaintiffs did not respond.

14. On September 14, 2009 Hill filed her request to submit regarding the *Motion for Entry of Scheduling Order*, mailing a copy to Mr. Johnson at the PO Box address. Mr. Johnson had never filed an objection to the motion and did not object to the request to submit. The court signed and entered the *Second Amended Discovery Plan and Order* on October 1, 2009. The new cut-off date for discovery was December 31, 2009.

15. On October 23, 2009 Hill filed her *Motion for Summary Judgment* and supporting

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memorandum, mailing copies to Mr. Johnson at the PO Box address on October 21, 2009. Mr. Johnson did not file an opposing memorandum, so Hill filed her request to submit for decision on November 16, 2009, mailing a copy to the PO Box address on November 13, 2009.

16. On October 28, 2009 Diamond filed its *Motion for Summary Judgment* and supporting memorandum, mailing copies to Mr. Johnson at the Parkway address on October 26, 2000. Mr. Johnson did not file an opposing memorandum, so Diamond filed its request to submit for decision on November 12, 2009, mailing a copy to the Parkway address on November 10, 2009.

17. According to Mr. Johnson's Rule 56(f) Affidavit, he left his home office and moved to an office located at 575 South State Street, Orem on "November 1 to 8, 2009." This lasted one month, after which he was forced to leave this location. His affidavit states that from the State Street office he moved into his new office at 359 East 1200 South, Orem on December 8, 2009.

18. However, Mr. Johnson responded from another address, 639 South Riverbreeze Drive, Orem ("the Riverbreeze address"), on November 25, 2009, when he filed a document entitled *Plaintiffs* [sic] *Response to Motion for Summary Judgment and Motion for Extension of Time to Respond.* In that motion he argued that the plaintiffs needed more time to respond to Diamond's motion for summary judgment because "their [the plaintiffs'] depositions have never been completed," even after the plaintiffs had attended three separate days of depositions. He

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also argued that the requests for admission were "inappropriate" and that the "failure to answer the requests for admission cannot be the basis of establishing conclusions of fact for the case." Nowhere in this document did Mr. Johnson argue that Diamond's requests for admission and the motion for summary judgment had been mailed to an incorrect address for Mr. Johnson or that he had not timely received them. Also, the only defendant mentioned by Mr. Johnson in this document was Diamond; he did not address Hill's motion for summary judgment.

19. Mr. Johnson's Rule 56(f) Affidavit never mentions or explains the Riverbreeze address or the PO Box address. Amazingly, the heading on his affidavit lists his address at 639 South Riverbreeze Dr., PO Box 970880, Orem—not the new office address at 359 East 1200 South, Orem, which was mentioned in his affidavit.

20. On December 7, 2009 the court issued its ruling on Hill's *Motion for Summary Judgment*. Because the plaintiffs had failed to respond to Hill's requests for admission, the court found that there were no undisputed material facts and granted the motion. The court mailed Mr. Johnson's copy to the Riverbreeze address, as that was the most recent address found by the court on any mailing certificates and on Mr. Johnson's headings.

21. On December 15, 2009 the court issued its ruling on Diamond's *Motion for Summary Judgment*. Noting that the plaintiffs' November 25, 2009 response to the motion and motion for extension of time was thirteen days late (at best), the court still addressed Mr. Johnson's arguments, finding that his response was inadequate under both Rules 7 and 56 of the

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Utah Rules of Civil Procedure. For the same reasons listed in the December 7, 2009 ruling, the court granted Diamond's *Motion for Summary Judgment.*

22. On December 24, 2009 Mr. Johnson filed *Plaintiffs* [sic] *Request for Hearing.* The address used on his heading was the PO Box address—not the Riverbreeze address or the new address at 359 East 1200 South, Orem.

23. On December 24, 2009 Mr. Johnson also filed *Plaintiffs* [sic] *Request to Continue Time Period to Respond to Motions for Summary Judgment* and his Rule 56(f) Affidavit. The address used on his heading included both the PO Box address and the Riverbreeze address. In the motion, Mr. Johnson claimed for the first time that Diamond's summary judgment motion was sent to the wrong address and that he "did not have it by the time in which he should have responded. The move caused counsel to miss the deadline for responding to Defendant Hill."

24. Mr. Johnson has never denied that he received the motions for summary judgment. In his Rule 56(f) Affidavit, Mr. Johnson blamed his missed deadlines upon the various moves he made during that time period.

25. Mr. Johnson's most recently filed document was received by the court on February 8, 2010. In his heading he used the PO Box address. The court notes that, as of the date of this ruling, the Utah State Bar lists 359 East 1200 South, Orem as Mr. Johnson's address.

26. On January 25, 2010 the court signed and entered Diamond's *Findings of Fact,*

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Conclusions of Law, and Order of Dismissal with Prejudice ("the Judgment").[3]

DISCUSSION

I. The Plaintiffs' Arguments

In their *Motion to Alter or Amend Judgments Entered on January 25, 2010*, the plaintiffs "challenge[] the summary judgment and findings of fact entered in favor of Defendant Diamond Line Delivery System and Defendant Hill. This Court entered judgment on January 25, 2010." *See Motion to Alter or Amend* at p. 1-2. However, a review of the Judgment itself reveals that this Judgment was provided by and applied only to Diamond. Therefore, this ruling will apply to Diamond's judgment only.

In this motion the plaintiffs make their familiar arguments in the context of Rules 59 and 52(a) of the Utah Rules of Civil Procedure. With regard to new trial motions and motions to alter or amend a judgment, Rule 59 states:

> (a) *Grounds.* Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes . . .
> (a)(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.
> (a)(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.
> (a)(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

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[3]This is the only procedural fact not found in the document from which the remaining procedural facts are taken.

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> (e) *Motion to alter or amend a judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

The plaintiffs also refer to Rule 52(a), where it states: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous . . ."

Therefore, although the title of the plaintiffs' motion does not make their goal clear, the references to the above rules of civil procedure indicate that their motion is a motion to alter or amend the January 25, 2010 judgment, as well as a motion for a new trial. After listing the various motions filed by the plaintiffs after the court granted the defendants' motions for summary judgment, the plaintiffs list the following grounds for granting this motion:

1. The factual findings in the Judgment "are absolutely false."

2. There is insufficient evidence to support the Judgment.

3. All of the exhibits attached to the plaintiffs' reply to the defendants' opposition to the plaintiffs motion to quash the admissions demonstrate that the facts are in the plaintiffs' favor. The defendants acted in bad faith when they argued otherwise.

4. The summary judgment was based solely upon the requests for admission, without use of any other evidence.

5. The requests for admissions were served upon the plaintiffs outside the time period of the original discovery order.

6. Counsel for plaintiffs moved his office, and the defendants sent mail to the wrong address.

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7. The plaintiffs were out of the country and could not help their counsel respond to the motions for summary judgment.

8. The plaintiffs need time for further discovery.

9. The Judgment denied the plaintiffs any damages.

II. Diamond's Response

Diamond responds to the plaintiff's arguments by noting that the motion and objections are insufficient to support relief under Rule 59(e), as the only irregularities in the proceedings of the court were created by the plaintiffs' negligence of their case. Diamond explains, once again, that the plaintiffs' counsel failed to notify the parties and the court each of the times that he moved to a new address. The plaintiffs' counsel also failed to monitor the court docket, respond to the requests for admissions, the motions for summary judgment, and the motion for an amended scheduling order.

Diamond also argues that the damages award was completely adequate, as the court granted summary judgment to Diamond on all claims, having found that Diamond was not liable or responsible for the plaintiffs' injuries, based upon the plaintiffs' admissions (through their failure to respond to the requests for admissions). Therefore, the plaintiffs were not entitled to any damages.

III. The Court's Analysis

The court finds that it has nothing to discuss that has not already been discussed at

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length in the two previous rulings. The plaintiffs' attempts, through this additional motion, are simply an effort to solve the same problems by coming from a different angle. The arguments made have been made before without success. The plaintiffs' counsel's failures and inadequacies, as discussed in the previous rulings, are still the cause of the dismissal of this action upon the court's consideration of the defendants' motions for summary judgment.

The court incorporates by reference all of the court's reasoning found in the discussion sections of its *Ruling on Plaintiffs' (1) Request for Hearing and (2) Request to Continue Time Period to Respond to Motions for Summary Judgment and (3) Mr. Johnson's Rule 56(f) Affidavit*, entered on May 5, 2010, and its *Ruling on Plaintiffs' Motion to Quash or Withdraw Admissions*, entered on May 14, 2010.

CONCLUSIONS OF LAW

1. The court concludes that there are no grounds which would justify amending or altering the Judgment entered on January 25, 2010.

2. The court concludes that there are no grounds which would justify a new trial.

3. The court concludes that there is no irregularity in this case's proceedings which would justify granting the plaintiffs' motion. Any irregularity perceived by the plaintiffs was caused by their failure to respond to the requests for admissions and motions for summary judgment which were mailed to plaintiff's counsel and which he does not deny were received.

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4. The court concludes that the lack of damages awarded to the plaintiffs was the natural result of the plaintiffs' failure to respond to the requests for admissions and the resulting success of the defendants' motions for summary judgment.

5. The court concludes that the facts deemed admitted by the plaintiffs' failure to respond to the requests for admissions did support and justify the Judgment obtained by Diamond through its motion for summary judgment. Any insufficiency of the evidence claimed by the plaintiffs was the result of their failure to respond to the requests for admissions which were timely served by the defendants.

ORDER

1. The court denies the *Plaintiffs* [sic] *Motion to Alter or Amend Judgments entered on January 25, 2010.*

2. The court leaves in place and in effect the *Findings of Fact, Conclusions of Law, and Order of Dismissal With Prejudice*, which was signed and entered on January 25, 2010.

3. The court also leaves in place and in effect the *Notice of Entry of Judgment* which was entered on February 8, 2010.

Dated this 11th day of June, 2010.

CLAUDIA LAYCOCK
Fourth District Court Judge

Case No. 070403371

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MAILING CERTIFICATE

I certify that a true copy of the foregoing ruling was mailed on the 11th day of June, 2010 to the following:

S. Austin Johnson
PO Box 970880
Orem UT 84097-0880

S. Austin Johnson
359 E 1200 S
Orem UT 84058

Richard Glauser
Trevor Bradford
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1218 E 7800 S Ste 300
Sandy UT 84094

Terry M. Plant
Jeremy M. Neeley
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136 E South Temple Ste 1700
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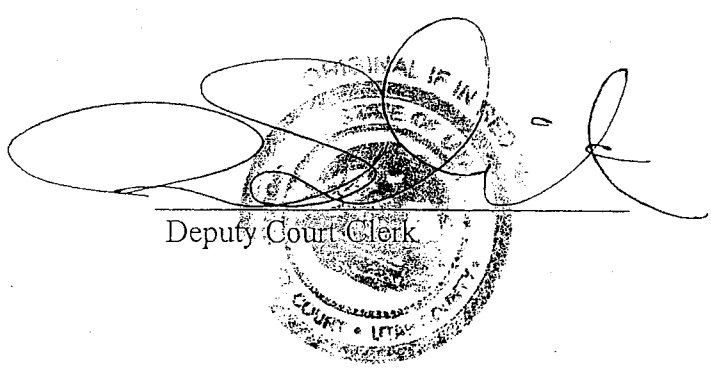

Deputy Court Clerk

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FILED
MAY 14 2010
4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

OSCAR MERCADO and MARICELA QUISPE, Plaintiffs, v. DIAMOND DELIVERY LINES and LINDSEY HILL, Defendants.	**RULING ON PLAINTIFFS' MOTION TO QUASH OR WITHDRAW ADMISSIONS** CASE NO. 070403371 DATE: 14 May 2010 Judge Claudia Laycock Division 3

This matter comes before the court upon submission of *Plaintiffs' Motion To Quash or Withdraw Admissions*.

PROCEDURAL FACTS

1. On November 15, 2007 Oscar Mercado and Maricela Quispe ("plaintiffs") filed their complaint against Lindsey Hill ("Hill") and Diamond Line Delivery System ("Diamond"). The plaintiffs' attorney was and still is S. Austin Johnson ("Mr. Johnson"). At that time he listed his mailing address as 345-B East University Parkway in Orem, Utah ("the Parkway address").

2. On November 3, 2008 the court ruled in a memorandum decision on Hill's *Motion to Dismiss or Alternatively to Compel Production of Documents*, granting the unopposed motion.

3. On December 8, 2008 the court signed and entered the parties' *Stipulated Discovery Plan and Order*, in which the parties agreed that fact discovery would be completed by April 30, 2009.

4. According to Mr. Johnson's Rule 56(f) affidavit ("Mr. Johnson's Rule 56(f)

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Affidavit"), which was attached to the plaintiffs' *Request to Continue Time Period to Respond to Motions for Summary Judgment* (filed on December 24, 2009), Mr. Johnson moved from the Parkway address to 251 West Riverpark Drive, Suite 100, Provo ("the Riverpark address") on February 1, 2009.

5. On February 20, 2009 Diamond filed its *Notice of Deposition of Plaintiffs*. The attached mailing certificate used the following address for Mr. Johnson: 251 West Riverpark Drive, Suite 100, Provo. This was the first time that this new address for Mr. Johnson appeared in the court's file.

6. On May 13, 2009 and May 29, 2009 Hill sent a proposed amended discovery plan and order to Mr. Johnson at the Riverpark address. Mr. Johnson did not respond to either mailing, nor did he file an objection with the court.

7. By June 1, 2009, when Hill filed her *Lay Witness Designations*, both defendants were mailing documents to Mr. Johnson at the Riverpark address. The court file does not contain a notice of change of address for Mr. Johnson as of June 1, 2009.

8. Discovery was clearly occurring in June and July 2009. The defendants filed various notices during those months, including (1) a notice of the deposition of defendant Hill by Diamond,[1] (2) a notice of the deposition of David Teams by Hill, and (3) Diamond's first set of

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[1]This notice was sent to the Riverpark address, but was returned on July 29, 2009 to Diamond as undeliverable. The post office's attached sticker noted the following:
RETURN TO SENDER:
JOHNSON LAW OFFICE
MOVED LEFT NO ADDRESS
UNABLE TO FORWARD

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interrogatories to Hill. Mr. Johnson did not file any objections to this ongoing discovery, all of which occurred after the April 30, 2009 discovery cut-off date.

9. According to Mr. Johnson's Rule 56(f) Affidavit, on June 15, 2009 he left the Riverpark Drive location and "attempted a home office until November 1, 2009." His affidavit does not provide his home address, nor did he ever provide his home address to the court or to opposing counsel.

10. On August 10, 2009 Hill filed a *Motion for Entry of Scheduling Order*, seeking to have the court enter the proposed *Second Amended Stipulated Discovery Plan and Order*. Hill alleged that both defendants' attorneys had signed the proposed order, but that Mr. Johnson had not, despite numerous attempts by Hill's attorney to accomplish that goal. The mailing certificate which accompanied the motion and its memoranda had the following notation for Mr. Johnson's address: "No current address." As of August 10, 2009, when this motion and order were filed, the court had not received a notice of change of address from Mr. Johnson.

11. On or about August 11, 2009 Trevor A. Bradford, counsel for Defendant Hill, obtained a current address for Mr. Johnson from the Utah State Bar, which was PO Box 970880 in Orem, Utah (the "PO Box address").

12. On September 2, 2009 Hill filed her certificate of service for its *First Set of Requests for Admission to Plaintiffs*, mailing the requests to Mr. Johnson at the PO Box address on August 31, 2009. The plaintiffs' response was due on Monday, October 5, 2009, but the

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RETURN TO SENDER.
See Exhibit A to Diamond's opposition memorandum.

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plaintiffs did not respond.

13. On September 8, 2009 Diamond filed its certificate of service for its *First Set of Requests for Admission to Plaintiffs*, mailing the requests to Mr. Johnson at the Parkway address on September 4, 2009. Apparently, Diamond had not yet discovered the PO Box address and reverted back to the Parkway address as the last-known successful address. Again, the court was not apprised of this new address. The plaintiffs' response was due on Wednesday, October 7, 2009, but the plaintiffs did not respond.

14. On September 14, 2009 Hill filed her request to submit regarding the *Motion for Entry of Scheduling Order*, mailing a copy to Mr. Johnson at the PO Box address. Mr. Johnson had never filed an objection to the motion and did not object to the request to submit. The court signed and entered the *Second Amended Discovery Plan and Order* on October 1, 2009. The new cut-off date for discovery was December 31, 2009.

15. On October 23, 2009 Hill filed her *Motion for Summary Judgment* and supporting memorandum, mailing copies to Mr. Johnson at the PO Box address on October 21, 2009. Mr. Johnson did not file an opposing memorandum, so Hill filed her request to submit for decision on November 16, 2009, mailing a copy to the PO Box address on November 13, 2009.

16. On October 28, 2009 Diamond filed its *Motion for Summary Judgment* and supporting memorandum, mailing copies to Mr. Johnson at the Parkway address on October 26, 2000. Mr. Johnson did not file an opposing memorandum, so Diamond filed its request to submit for decision on November 12, 2009, mailing a copy to the Parkway address on November 10, 2009.

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17. According to Mr. Johnson's Rule 56(f) Affidavit, he left his home office and moved to an office located at 575 South State Street, Orem on "November 1 to 8, 2009." This lasted one month, after which he was forced to leave this location. His affidavit states that from the State Street office he moved into his new office at 359 East 1200 South, Orem on December 8, 2009.

18. However, Mr. Johnson responded from another address, 639 South Riverbreeze Drive, Orem ("the Riverbreeze address"), on November 25, 2009, when he filed a document entitled *Plaintiffs* [sic] *Response to Motion for Summary Judgment and Motion for Extension of Time to Respond.* In that motion he argued that the plaintiffs needed more time to respond to Diamond's motion for summary judgment because "their [the plaintiffs'] depositions have never been completed," even after the plaintiffs had attended three separate days of depositions. He also argued that the requests for admission were "inappropriate" and that the "failure to answer the requests for admission cannot be the basis of establishing conclusions of fact for the case." Nowhere in this document did Mr. Johnson argue that Diamond's requests for admission and the motion for summary judgment had been mailed to an incorrect address for Mr. Johnson or that he had not timely received them. Also, the only defendant mentioned by Mr. Johnson in this document was Diamond; he did not address Hill's motion for summary judgment.

19. Mr. Johnson's Rule 56(f) Affidavit never mentions or explains the Riverbreeze address or the PO Box address. Amazingly, the heading on his affidavit lists his address at 639

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South Riverbreeze Dr., PO Box 970880, Orem—not the new office address at 359 East 1200 South, Orem, which was mentioned in his affidavit.

20. On December 7, 2009 the court issued its ruling on Hill's *Motion for Summary Judgment*. Because the plaintiffs had failed to respond to Hill's requests for admission, the court found that there were no undisputed material facts and granted the motion. The court mailed Mr. Johnson's copy to the Riverbreeze address, as that was the most recent address found by the court on any mailing certificates and on Mr. Johnson's headings.

21. On December 15, 2009 the court issued its ruling on Diamond's *Motion for Summary Judgment*. Noting that the plaintiffs' November 25, 2009 response to the motion and motion for extension of time was thirteen days late (at best), the court still addressed Mr. Johnson's arguments, finding that his response was inadequate under both Rules 7 and 56 of the Utah Rules of Civil Procedure. For the same reasons listed in the December 7, 2009 ruling, the court granted Diamond's *Motion for Summary Judgment*.

22. On December 24, 2009 Mr. Johnson filed *Plaintiffs* [sic] *Request for Hearing*. The address used on his heading was the PO Box address—not the Riverbreeze address or the new address at 359 East 1200 South, Orem.

23. On December 24, 2009 Mr. Johnson also filed *Plaintiffs* [sic] *Request to Continue Time Period to Respond to Motions for Summary Judgment* and his Rule 56(f) Affidavit. The address used on his heading included both the PO Box address and the Riverbreeze address. In

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the motion, Mr. Johnson claimed for the first time that Diamond's summary judgment motion was sent to the wrong address and that he "did not have it by the time in which he should have responded. The move caused counsel to miss the deadline for responding to Defendant Hill."

24. Mr. Johnson has never denied that he received the motions for summary judgment. In his Rule 56(f) Affidavit, Mr. Johnson blamed his missed deadlines upon the various moves he made during that time period.

25. Mr. Johnson's most recently filed document was received by the court on February 8, 2010. In his heading he used the PO Box address. The court notes that, as of the date of this ruling, the Utah State Bar lists 359 East 1200 South, Orem as Mr. Johnson's address.

DISCUSSION

In their *Motion and Memorandum to Quash or Withdraw Admissions*, the plaintiffs, through their counsel, Mr. Johnson, list the following grounds for granting their motion:

1. The requests for admission were served after discovery had ended.

2. The requests for admission did not comply with Rule 36 of the Utah Rules of Civil Procedure.

3. Diamond's requests for admission were sent to the wrong address.

4. The requests for admission were made in bad faith.

5. Plaintiffs also "incorporated by reference their response to the proposed findings of fact, conclusions of law, and proposed orders of dismiss [sic], and their request for time

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extensions to respond to summary judgment, and affidavit from counsel, all filed this same day."[2]

The motion/memorandum was comprised of 19 lines of text without any citations to case law and only one citation to a rule of civil procedure. After receiving the defendants' opposition memoranda, the plaintiffs responded with a few more pages of argument, personal testimony from Mr. Johnson (but not in affidavit form), a declaration about the facts of the incident from each of the plaintiffs, and other items of evidence, including doctors' reports, traffic accident reports, and investigators' reports.

The court will address each of the grounds listed above.

I. The Timeliness of the Requests for Admission and Mailing Addresses

The plaintiffs argue that the defendants' requests for admission were served after fact discovery had ended. However, as demonstrated by the procedural facts listed above, fact discovery was extended to December 31, 2009 by the court when it signed the *Second Amended Discovery Order* on October 1, 2009. Although this was an order that was signed somewhat after the fact, it was, nonetheless, an order that was consistent with the discovery process in this matter.

The first discovery order was signed by the court on December 8, 2008. The parties agreed at that time to complete fact discovery by April 30, 2009. As the parties were involved in further discovery during the summer of 2009, it is clear that no one involved in this case believed

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[2]The plaintiffs' *Request to Continue Time Period to Respond to Motions for Summary Judgment* was ruled upon by the court on 3 May 2010.

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that fact discovery had been completed by April 30, 2009.

Hill's attorney recognized that the April 30, 2009 deadline had come and gone and attempted to bring the parties to a new agreement. His May 13 and May 29, 2009 proposals were mailed to Mr. Johnson at the Riverpark address, which, by Mr. Johnson's own admission, was a correct address for Mr. Johnson in May 2009. Mr. Johnson never responded to these proposals.

Discovery, including depositions and interrogatories, continued through June and July of 2009. Mr. Johnson was clearly present and participated at the deposition of his client, Maricela Quispe, on May 4, 2009 (obviously after April 30, 2009), at which time the attorneys and Ms. Quispe agreed to continue the deposition, due to her health concerns.

On August 10, 2009 Hill filed her *Motion for Entry of Scheduling Order*, bringing the discovery issue to the court's attention. This motion was not mailed to Mr. Johnson's address, as Hill's attorney did not have a current address for Mr. Johnson, as indicated on the mailing certificate. (According to Mr. Johnson, this was during his home office "attempt.") On or about the next day, her attorney obtained the PO Box address from the Utah State Bar, which Mr. Johnson himself has subsequently used on his headings.

When Hill's attorney filed the request to submit regarding the *Motion for Entry of Scheduling Order* on September 14, 2009, a copy was mailed to Mr. Johnson at the PO Box address. Mr. Johnson did not object, and the court signed the order on October 1, 2009, amending the new cut-off date to December 31, 2009.

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The court finds that the *Motion for Entry of Scheduling Order* could not have been mailed to a correct address for Mr. Johnson, as opposing counsel did not have a current address for Mr. Johnson; however, the request to submit for the motion was, indeed, mailed to a correct address. Mr. Johnson does not complain that he did not receive this motion or the previous letters. He merely claims that there "was no authority for serving this fact discovery on those dates." Mr. Johnson, however, ignores the reality of what had transpired during the summer. Discovery was ongoing, and he and his clients were participating, regardless of an outdated discovery order. Instead of objecting to the motion and the request to submit, which he clearly received, he ignored the motion, the request to submit, and the order which was subsequently signed.

Mr. Johnson also claims that the plaintiffs "have no duty to respond to the requests for admission until they are served within a time period when permitted." Mr. Johnson either forgets or ignores the fact that he failed to respond to two letters from Hill's attorney about amending the discovery order, as well as the motion filed later. Months after the fact, he now wants to claim that his clients had no duty to respond, even though he and his clients had willingly participated in depositions and interrogatories during that summer. He cannot have it both ways. His clients had a duty to respond or to object to the motion and the request to submit; they did neither and, unfortunately, will suffer the consequences.

As noted above, Hill mailed her requests for admission to Mr. Johnson on August 31,

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2009, while Diamond mailed its requests for admission on September 4, 2009. Hill used the PO Box address, which was a correct address, according to the Utah State Bar. Diamond used the Parkway address, which was the last address used by Diamond with success. Although Mr. Johnson complains that Diamond sent its requests for admission to the wrong address, he does not claim that he never received the requests. As noted by the defendants, Mr. Johnson could have also used the court's online docketing program to keep track of what had been filed in the case. Finally, Mr. Johnson never filed an objection to the requests for admission after receiving the requests, as required by Rule 36(a)(2). With no admissions, denials, or objections from the plaintiffs, the defendants did just what Rule 36 allows—they deemed the matters admitted and then moved forward to summary judgment.

The court concludes that the requests for admission were timely filed within the time lines of the *Second Amended Discovery Order* and that the plaintiffs failed to object to the requests for admission as required by Rule 36(a)(2).

II. Compliance with Rule 36 of the Utah Rules of Civil Procedure

The plaintiffs argue that the requests for admission are improper under Rule 36 of the Utah Rules of Civil Procedure, because they "propose final conclusions of law and do not state any specific facts" and because they "seek admissions in bad faith. They seek admissions of facts that are false. They violate an insurer's duty to act in good faith." The plaintiffs also seek

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to "incorporate by reference their response to the proposed findings of fact, conclusions of law, and proposed orders of dismiss [sic]. . ."

Defendant Hill's memorandum in opposition discusses the Utah Supreme Court decision which outlines for trial courts the appropriate analysis under Rule 36 of the Utah Rules of Civil Procedure. Decided in 1998, *Langeland v. Monarch Motors*, 952 P.2d 1058 (Utah 1998) sets out a two-step process by which a request to withdraw admissions should be considered:

> As we have earlier pointed out, the decision of the trial judge to permit withdrawal or amendment of Monarch's admissions can therefore by upheld only if (1) amendment or withdrawal would serve the presentation of the merits of the action, and (2) amendment or withdrawal would not prejudice Langeland in maintaining his action on the merits.

Id. at 1061.

This two-step process is not original to the Utah Supreme Court, but is merely a paraphrase of Rule 36(b):

> . . . the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

However, the *Langeland* case takes the first step and further divides it into a two-step process:

> To show that a presentation of the merits of an action would be served by amendment or withdrawal of an admission, the party seeking amendment or withdrawal must (1) show that the matters deemed admitted against it are relevant to the merits of the underlying cause of action, and (2) introduce

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> some evidence by affidavit or otherwise of specific facts indicating that the matter deemed admitted against it are in fact untrue.

Id. at 1062.

A. Relevance of the Admissions to the Merits

Are the matters which were deemed admitted by the plaintiffs' failure to respond to the defendants' requests for admission relevant to the merits of the underlying cause of action? In the *Langeland* case, only one admission (No. 2) was at issue. In the instant case, the court has no idea which admissions the plaintiffs seek to withdraw, as they never opposed any of the requests for admission and their motion and memoranda do not outline which particular admissions they seek to withdraw.

The plaintiffs leave it to the court to assume that they desire to withdraw all admissions; they also leave it to the court to rifle through the court's file, find the requests for admission somewhere in the file (possibly attached to the two motions for summary judgment or included therein), and to determine for itself which admissions are relevant. The other alternative for the court is to read through all of the documents attached to the plaintiffs' reply memorandum and to assume that the facts found in those documents are related to the admissions and are relevant to the merits of the case.

Either approach is inappropriate for the court to follow, as it is not the court's duty to prepare and argue the plaintiffs' motion on behalf of the plaintiffs. Doing so would deprive the defendants of the opportunity to respond to the court's/plaintiffs' arguments, as briefing on this

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motion is complete. Furthermore, it was not the defendants' obligation to make the plaintiffs' arguments in the defendants' responsive memoranda.

The court declines to act as the plaintiffs' attorney and finds that, for lack of support offered in the plaintiffs' memoranda, the court cannot determine that the matters which were deemed admitted are relevant to the merits of the underlying cause of action.

B. The Truth of the Matter Deemed Admitted

Have the plaintiffs introduced some evidence by affidavit or otherwise of specific facts indicating that the matters deemed admitted against them are, in fact, untrue? The plaintiffs, having been steered to the *Langeland* case by defendant Hill's opposition memorandum, attached several exhibits to their reply memorandum, including a signed, but un-notarized, declaration from plaintiff Maricela Quispe and an unsigned declaration from plaintiff Oscar Mercado. Neither declaration complies with Rule 11(a) of the Utah Rules of Civil Procedure and UCA 78B-5-705.[3] Without proper status as a signed affidavit or declaration, the court cannot consider either document.

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[3]78B-5-705. **Unsworn declaration in lieu of affidavit.**
(1) If the Utah Rules of Criminal Procedure, Civil Procedure, or Evidence require or permit a written declaration upon oath, an individual may, with like force and effect, provide an unsworn written declaration, subscribed and dated under penalty of this section, in substantially the following form:
"I declare (or certify, verify, or state) under criminal penalty of the State of Utah that the foregoing is true and correct.
Executed on (date).
(Signature)".

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In addition, the plaintiffs have included in their exhibits a number of other documents, including medical records, a notice of deposition, letters from the court reporter regarding transcripts of depositions, resumes of recorded statements, accident reports, and the first page of a deposition transcript. In their reply memorandum, the plaintiffs state:

> The declarations from plaintiffs, the pages of their depositions, the statements taken by the insurance company adjusters of the drivers on the day of the accident all show that the requests for admissions were absolutely false. See Exhibit B, attached hereto. Plaintiffs did not have fault in causing the accidents, they were seriously injured, and the defendants were at fault. It was bad faith to argue contrary to these facts. Defendants have failed to present any evidence in support of the ridiculous facts they allege. Extensive discovery has been completed in this case and they refer to none of it. It is bad faith to claim facts that counsel know are false, and to go forward with such falsities when the counsel for defendants were not allowed to service the discovery requests. The admissions are clearly untrue and the admissions by operation of law should be quashed.

Again, the plaintiffs leave it to the court and the defendants to make the plaintiffs' arguments for them. As stated in *Langeland*, "However, while the motion disputes the admissions which Monarch wishes to deny, it lacks any sort of *detailed articulation* of such arguments and is entirely devoid of evidence of specific facts contradicting the admissions." *Id.* at 1062-1063 (emphasis added). It is not enough to baldly claim that the plaintiffs were not at fault and that the defendants were at fault, nor is it sufficient to claim that the defendants acted in bad faith in submitting their requests for admissions to the plaintiffs. While the plaintiffs have attempted to supply evidence (admissible or not) to the court in their reply memorandum, they have not made fact-based arguments which indicate that the matters deemed admitted against

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them are, in fact, untrue. The court cannot perform this task for them, nor will the court require the defendants to step up to the plate for the plaintiffs.

Therefore, having performed the analysis required by *Langeland*, the court concludes that the plaintiffs have not shown that the amendment or withdrawal of the admissions would serve the presentation of the merits of this action.

C. Prejudice to the Defendants

Having found that the plaintiffs have not shown that the amendment or withdrawal of the admissions would serve the presentation of the merits of this action, the court does not need to consider whether amendment or withdrawal would prejudice the defendants in maintaining their action on the merits. As found in *Langeland*, the plaintiffs' "failure to satisfy the first requirement of *rule 36(b)* relieves [the defendants] of the burden of showing that [they] would suffer prejudice as a result of the withdrawal or amendment of the admissions." *Id.* (Emphasis in the original.)

CONCLUSIONS OF LAW

1. The court concludes that the requests for admission were timely filed within the time lines of the *Second Amended Discovery Order* and that the plaintiffs failed to object to the requests for admission as required by Rule 36(a)(2).

2. Because of lack of support offered in the plaintiffs' memoranda, the court cannot determine that the matters which were deemed admitted are relevant to the merits of the

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underlying cause of action.

3. The court concludes that the plaintiffs have not shown that the amendment or withdrawal of the admissions would serve the presentation of the merits of this action.

4. The court concludes that the plaintiffs' failure to satisfy the first requirement of Rule 36(b) relieves the defendants of the burden of showing that they would suffer prejudice as a result of the withdrawal or amendment of the admissions

ORDER

1. The court denies the plaintiffs' *Motion to Quash or Withdraw Admissions.*

Dated this 14th of May, 2010.

CLAUDIA LAY
Fourth District Court Judge

Case No. 070403371

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MAILING CERTIFICATE

I certify that a true copy of the foregoing ruling was mailed on 14 May 2010 to the following:

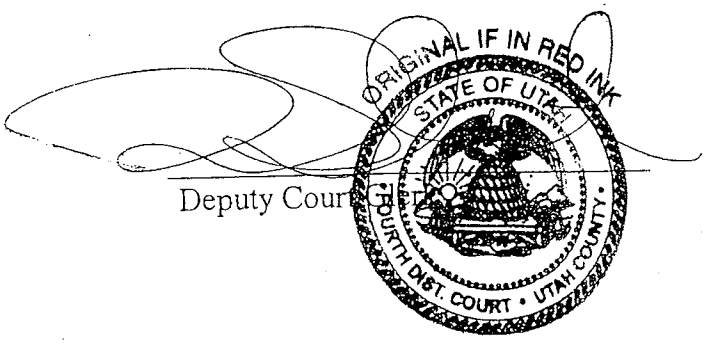
S. Austin Johnson
PO Box 970880
Orem UT 84097-0880

S. Austin Johnson
359 E 1200 S
Orem UT 84058

Richard Glauser
Trevor Bradford
SMITH & GLAUSER
1218 E 7800 S Ste 300
Sandy UT 84094

Terry M. Plant
Jeremy M. Neeley
PLANT, CHRISTENSEN & KANELL
136 E South Temple Ste 1700
Salt Lake City UT 84111

Deputy Court Clerk



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FILED
MAY 05 2010
4TH DISTRICT
STATE OF UTAH
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

OSCAR MERCADO and MARICELA QUISPE, Plaintiffs, **v.** DIAMOND DELIVERY LINES and LINDSEY HILL, Defendants.	**RULING ON PLAINTIFFS' (1) REQUEST FOR HEARING AND (2) REQUEST TO CONTINUE TIME PERIOD TO RESPOND TO MOTIONS FOR SUMMARY JUDGMENT and (3) MR. JOHNSON'S RULE 56(f) AFFIDAVIT** CASE NO. 070403371 DATE: 3 May 2010 Judge Claudia Laycock Division 3

This matter comes before the court upon submission of *Plaintiffs' Request for Hearing* and *Plaintiffs' Request to Continue Time Period to Respond to Motions for Summary Judgment,* and Mr. Johnson's Rule 56(f) Affidavit, which accompanied the motion.

PROCEDURAL FACTS

1. On November 15, 2007 Oscar Mercado and Maricela Quispe ("plaintiffs") filed their complaint against Lindsey Hill ("Hill") and Diamond Line Delivery System ("Diamond"). The plaintiffs' attorney was and still is S. Austin Johnson ("Mr. Johnson"). At that time he listed his mailing address as 345-B East University Parkway in Orem, Utah ("the Parkway address").

2. On November 3, 2008 the court ruled in a memorandum decision on Hill's *Motion to Dismiss or Alternatively to Compel Production of Documents*, granting the unopposed motion.

3. On December 8, 2008 the court signed and entered the parties' *Stipulated Discovery*

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Plan and Order, in which the parties agreed that fact discovery would be completed by April 30, 2009.

4. According to Mr. Johnson's Rule 56(f) affidavit ("Mr. Johnson's Rule 56(f) Affidavit"), which was attached to the plaintiffs' *Request to Continue Time Period to Respond to Motions for Summary Judgment* (filed on December 24, 2009), Mr. Johnson moved from the Parkway address to 251 West Riverpark Drive, Suite 100, Provo ("the Riverpark address") on February 1, 2009.

5. On February 20, 2009 Diamond filed its *Notice of Deposition of Plaintiffs*. The attached mailing certificate used the following address for Mr. Johnson: 251 West Riverpark Drive, Suite 100, Provo. This was the first time that this new address for Mr. Johnson appeared in the court's file.

6. By June 1, 2009, when Hill filed her *Lay Witness Designations*, both defendants were mailing documents to Mr. Johnson at the Riverpark address. The court file does not contain a notice of change of address for Mr. Johnson as of June 1, 2009.

7. Discovery was clearly occurring in June and July 2009. The defendants filed various notices during those months, including (1) a notice of the deposition of defendant Hill by Diamond, (2) a notice of the deposition of David Teams by Hill, and (3) Diamond's first set of interrogatories to Hill. Mr. Johnson did not file any objections to this ongoing discovery, all of which occurred after the April 30, 2009 discovery cut-off date.

8. According to Mr. Johnson's Rule 56(f) Affidavit, on June 15, 2009 he left the Riverpark Drive location and "attempted a home office until November 1, 2009." His affidavit

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does not provide his home address, nor did he ever provide his home address to the court.

9. On August 10, 2009 Hill filed a *Motion for Entry of Scheduling Order*, seeking to have the court enter the proposed *Second Amended Stipulated Discovery Plan and Order*. Hill alleged that both defendants' attorneys had signed the proposed order, but that Mr. Johnson had not, despite numerous attempts by Hill's attorney to accomplish that goal. The mailing certificate which accompanied the motion and its memoranda had the following notation for Mr. Johnson's address: "No current address." As of August 10, 2009, when this motion and order were filed, the court had not received a notice of change of address from Mr. Johnson.[1]

10. On September 2, 2009 Hill filed its certificate of service for its *First Set of Requests for Admissions to Plaintiffs*, mailing the requests to Mr. Johnson at PO Box 970880 in Orem ("the PO Box address") on August 31, 2009.

11. On September 8, 2009 Diamond filed its certificate of service for *its First Set of Requests for Admission to Plaintiffs*, mailing the requests to Mr. Johnson at the Parkway address on September 4, 2009. Apparently, Diamond had not discovered the PO Box address yet. Again, the court was not apprised of this new address.

12. On September 14, 2009 Hill filed her request to submit regarding the *Motion for Entry of Scheduling Order*, mailing a copy to Mr. Johnson at the PO Box address. Mr. Johnson

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[1]Trevor A. Bradford, one of defendant Hill's attorneys, submitted an affidavit in support of Hill's *Memorandum in Opposition to Plaintiffs' Motion and Memorandum to Quash or Withdraw Admissions*. Paragraph 17 states: "On or about August 11, 2009, counsel for Defendant Hill obtained a current address for Plaintiffs' counsel from the Utah State Bar, which is a PO Box in Orem, Utah (hereinafter the 'PO Box address')."

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had never filed an objection to the motion. (The court notes, again, that Hill did not have a current address for Mr. Johnson when the motion was filed.) The court signed and entered the *Second Amended Discovery Plan and Order* on October 1, 2009. The new cut-off date for discovery was December 31, 2009.

13. On October 23, 2009 Hill filed her *Motion for Summary Judgment* and supporting memorandum, mailing copies to Mr. Johnson at the PO Box address on October 21, 2009. Mr. Johnson did not file an opposing memorandum, so Hill filed her request to submit for decision on November 16, 2009, mailing a copy to the PO Box address on November 13, 2009.

14. On October 28, 2009 Diamond filed its *Motion for Summary Judgment* and supporting memorandum, mailing copies to Mr. Johnson at the Parkway address on October 26, 2000. Mr. Johnson did not file an opposing memorandum, so Diamond filed its request to submit for decision on November 12, 2009, mailing a copy to the Parkway address on November 10, 2009.

15. According to Mr. Johnson's Rule 56(f) Affidavit, he left his home office and moved to an office located at 575 South State Street, Orem on "November 1 to 8, 2009." This lasted one month, after which he was forced to leave this location. His affidavit states that from the State Street office he moved into his new office at 359 East 1200 South, Orem on December 8, 2009.

16. However, Mr. Johnson responded from another address, 639 South Riverbreeze Drive, Orem ("the Riverbreeze address"), on November 25, 2009, when he filed a document entitled *Plaintiffs* [sic] *Response to Motion for Summary Judgment and Motion for Extension of*

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Time to Respond. In that motion he argued that the plaintiffs needed more time to respond to Diamond's motion for summary judgment because "their [the plaintiffs'] depositions have never been completed," even after the plaintiffs had attended three separate days of depositions. He also argued that the requests for admissions were "inappropriate" and that the "failure to answer the requests for admissions cannot be the basis of establishing conclusions of fact for the case." Nowhere in this document did Mr. Johnson argue that Diamond's requests for admissions and the motion for summary judgment had been mailed to an incorrect address for Mr. Johnson. Also, the only defendant mentioned by Mr. Johnson in this document was Diamond; he did not address Hill's motion for summary judgment.

17. Mr. Johnson's Rule 56(f) Affidavit never mentions or explains the Riverbreeze address or the PO Box address. Amazingly, his heading on his affidavit lists his address at 639 South Riverbreeze Dr., PO Box 970880, Orem—not the new office address at 359 East 1200 South, Orem, which was mentioned in his affidavit.

18. On December 7, 2009 the court issued its ruling on Hill's *Motion for Summary Judgment*. Because the plaintiffs had failed to respond to Hill's request for admissions, the court found that there were no undisputed material facts and granted the motion. The court mailed Mr. Johnson's copy to the Riverbreeze address, as that was the most recent address found by the court on any mailing certificates and on Mr. Johnson's headings.

19. On December 15, 2009 the court issued its ruling on Diamond's *Motion for*

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Summary Judgment. Noting that the plaintiffs' November 25, 2009 response to the motion and motion for extension of time was thirteen days late (at best), the court still addressed Mr. Johnson's arguments, finding that his response was inadequate under both Rules 7 and 56 of the Utah Rules of Civil Procedure. For the same reasons listed in the December 7, 2009 ruling, the court granted Diamond's *Motion for Summary Judgment*.

20. On December 24, 2009 Mr. Johnson filed *Plaintiffs* [sic] *Request for Hearing*. The address used on his heading was the PO Box address—not the Riverbreeze address or the new address at 359 East 1200 South, Orem.

21. On December 24, 2009 Mr. Johnson also filed *Plaintiffs* [sic] *Request to Continue Time Period to Respond to Motions for Summary Judgment* and his Rule 56(f) Affidavit. The address used on his heading included both the PO Box address and the Riverbreeze address. In the motion, Mr. Johnson claimed for the first time that Diamond's summary judgment motion was sent to the wrong address and that he "did not have it by the time in which he should have responded. The move caused counsel to miss the deadline for responding to Defendant Hill."

22. Mr. Johnson has never denied that he received the motions for summary judgment. In his Rule 56(f) Affidavit, Mr. Johnson blamed his missed deadlines upon the various moves he made during that time period.

23. Mr. Johnson's most recently filed document was received by the court on February 8, 2010. In his heading he used the PO Box address. The court notes that, as of the date of this

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ruling, the Utah State Bar lists 359 East 1200 South, Orem as Mr. Johnson's address.

DISCUSSION

I. *Plaintiffs' Request for Hearing*, filed December 24, 2009

In this document, Mr. Johnson generally requested a hearing so that "the Court may address all of the pending proposed orders, motions to withdraw admissions, and motions for summary judgment, and extensions for time to respond to the motions for summary judgment." This documents appeared to be addressed to both defendants.

After reviewing all of the motions filed by Mr. Johnson, the court finds that oral argument would not be helpful to the court in making its decision in these matters. As will be discussed below, Mr. Johnson's arguments in these motion are flawed and ignore very clear concepts found in the Utah Rules of Civil Procedure.

This request for hearing is denied.

II. *Plaintiffs' Request to Continue Time Period to Respond to Motions for Summary Judgment* and Mr. Johnson's Rule 56(f) Affidavit, filed December 24, 2009

In this document, which was filed after the court had ruled upon both of the motions for summary judgment, Mr. Johnson attempts to justify what is a half-hearted attempt at a Rule 56(f) affidavit and a half-hearted attempt at a Rule 60(b) motion to set aside a judgment, based upon excusable neglect. He succeeds at neither.

A. Rule 56(f) Affidavit. Rule 56(f) does, indeed, provide that a party opposing a

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motion for summary judgment may request additional time to respond. However, the rule anticipates that the responding party will file its Rule 56(f) affidavit *before* the motion is submitted for decision. As stated in Rule 56(f):

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

On November 25, 2009 the plaintiffs filed their *Plaintiffs* [sic] *Response to Motion for Summary Judgment and Motion for Extension of Time to Respond.* That response was not addressed by the court in its December 7, 2009 ruling granting Hill*'s Motion for Summary Judgment*, as the motion had not yet made its way to the court's file. The court did, however, address the response in its December 15, 2009 ruling granting *Diamond's Motion for Summary Judgment*:

> If considered a Rule 56(f) motion to continue to obtain further discovery, the plaintiffs' response also fails, as it does not contain an affidavit from their attorney or the plaintiffs themselves that they "cannot for reasons stated present by affidavit facts essential to justify the party's opposition." The attorney's signed response does not suffice under Rule 56(f).

Having disposed of the plaintiffs' ineffective attempt to obtain a continuance under Rule 56(f), the court then granted Diamond's motion for summary judgment. The court notes that the *Plaintiffs* [sic] *Response to Motion for Summary Judgment and Motion for Extension of Time to Respond* never mentioned that Diamond had sent its motion to an incorrect address for

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Mr. Johnson or that his office relocation had caused him to miss Hill's deadline. These new excuses did not appear until after the court had ruled on both motions for summary judgment.

The instant motion, *Plaintiffs' Request to Continue Time Period to Respond to Motions for Summary Judgment,* and Mr. Johnson's Rule 56(f) Affidavit were filed with the court on December 24, 2009—seventeen days after the court ruled on Hill's motion and nine days after the court ruled on Diamond's motion. Having been previously instructed by the court that a Rule 56(f) request requires an affidavit, Mr. Johnson provided such an affidavit, albeit after the fact. The court rejects his untimely attempts to comply with Rule 56(f), as the rule is very clear that the affidavit should be filed in lieu of a responding party's objection to a motion for summary judgment. The court denies Mr. Johnson's Rule 56(f) Affidavit as untimely.

In addition, Mr. Johnson states in his Rule 56(f) Affidavit that the transcripts of his clients' depositions were not ready, as their depositions had been only partially completed. He further claims that his client, Oscar Mercado, contacted Mr. Johnson in early December 2009 "and indicated they were going to Peru for the holidays.[2] They are not available to execute an affidavit to set for [sic] the facts concerning fault and their injuries."

The court notes that, regardless of the lack of deposition transcripts, Mr. Johnson could have filed affidavits from his clients. However, any attempts upon Mr. Johnson's part to obtain affidavits from his clients in early December 2009 would have been useless, as Diamond's notice

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[2]The plaintiffs' declarations, which were attached to their *Motion and Memorandum to Quash or Withdraw Admissions*, indicate that they actually went to Bolivia for the holidays.

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to submit was filed on November 12, 2009 and Hill's was filed on November 16, 2009. Both summary judgment motions had been filed in late September 2009; Mr. Johnson should have been discussing affidavit with his clients long before early December 2009. Again, the court denies Mr. Johnson's Rule 56(f) Affidavit as untimely.

B. Rule 60(b)(1). Although Mr. Johnson never mentions Rule 60(b)(1) in his motion and Rule 56(f) affidavit, it is very clear that excusable neglect is the theory under which he requests that the court's rulings on the defendants' summary judgment motions be set aside. Rule 60(b)(1) states: "On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect." Such a motion must be made "not more than 3 months after the judgment, order, or proceeding was entered or taken." Under Rule 60(b)(1), the motion is timely.

In *Menzies v. Galetka*, 2006 UT 81, ¶64, 150 P.3d 480, the Utah Supreme Court set forth a sequential three-part analysis for Rule 60(b)(1) motions:

> In general, a movant is entitled to have a default judgment set aside under 60(b) if (1) the motion is timely; (2) there is a basis for granting relief under one of the subsections of 60(b); and (3) the movant has alleged a meritorious defense. (Citations omitted.) These considerations should be addressed in a serial manner. In other words, there is no need to consider whether there is a basis for setting aside a default judgment if the motion was not made in a timely manner, and no need to consider whether there is a meritorious defense if there are not grounds for relief.

Having found that the motion is timely, having been filed within three months of the

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court's rulings on the defendants' motion for summary judgment, the court moves to step two of the analysis. Is there a basis for granting relief to the plaintiffs under subsection (1) of Rule 60(b)?

As recited by the court above and by the defendants in their opposing memoranda, Mr. Johnson has used (either by his account or by the defendants' accounts) seven different addresses during the pendency of this action. At no time has Mr. Johnson filed a notice of change of address with the court. As seen by the facts listed above, the defendants have attempted to keep track of Mr. Johnson's whereabouts, but have not always been successful. Mr. Johnson's Rule 56(f) Affidavit itself failed to include the Riverbreeze address, stating that he was then located at his new office at 359 East 1200 South, Orem as of December 8, 2009. Ironically, his headings on both this motion and his affidavit listed his address at 639 South Riverbreeze Dr., PO Box 970880, Orem—not the new office address on 1200 South, Orem.[3] In addition, as stated by Mr. Johnson in his affidavit, he "missed deadlines to respond to the motions for summary judgment because [his] files, staff and mail were scattered, misplaced, or not timely received."

The excuses offered by Mr. Johnson were addressed by the Utah Court of Appeal in

---

[3]Mr. Johnson might have argued that the court's clerk should have been able to keep track of his constantly changing addresses, as per his headings on his infrequently filed documents. This is not possible, as the court's clerk cannot possibly compare and track the changing addresses on the hundreds of documents she files every week. A notice to the court is the only method by which an address change can properly be brought to the court's notice. Indeed, the Utah Rules of Civil Procedure, as of November 1, 2009, now formally require an attorney and an unrepresented party to "promptly notify the court in writing of any change in that person's address, e-mail address, phone number or fax number." *See* Rule 76.

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Stevens v. LaVerkin City, 2008 UT App 129, 183 P.3d 1059. In that case, the plaintiff's attorney failed to respond to a motion for summary judgment, allegedly because his office was being remodeled and the firm's attorneys were working either from home or from temporary desks within the law office. The trial court denied the plaintiff's motion, "finding that [the plaintiff] had described the 'ordinary challenges in day to day business as a law firm' and that none of the circumstances identified 'were beyond [the] control' of [the plaintiff's] counsel." *Id.* at ¶15. The appellate court affirmed the trial court, finding that the plaintiff's counsel had failed to demonstrate excusable neglect.

> In *Stevens* the Court of Appeals defined excusable neglect as
>
> the exercise of "due diligence" by a reasonably prudent person under similar circumstances. (Citation omitted.) To demonstrate that the summary judgment "was due to excusable neglect, '[t]he movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control.'" (Citation omitted.) In order to establish excusable neglect, a party must provide the court with specific details that demonstrate due diligence in spite of uncontrollable circumstances.

Id. at ¶27. Mr. Johnson has provided the court with no explanation of his efforts to maintain a current address with the courts and with opposing counsel during his frequent moves from office to home to office. He explained that he missed important deadlines to respond to the motions for summary judgment because his files, staff and mail were scattered, misplaced, or not timely received. There is nothing in his circumstances which would distinguish him from the facts of *Stevens v. LaVerkin City*.

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Mr. Johnson's circumstances, although extreme as to the number of office relocations in a two-year period of time, consist of only the ordinary challenges in day-to-day business as a law firm. None of the circumstances (with regard to keeping his address current with the court and opposing counsel) he identified were beyond his control, and he has given the court no information which would establish that he used due diligence in setting up procedures which would have ensured the consistent delivery of mail, no matter where his office was located at the moment. He would have the court shift the burden to opposing counsel and the court to keep track of his whereabouts, when, as demonstrated by the disparity between the address on his Rule 56(f) Affidavit and the supposedly current address mentioned in the affidavit, he could not keep track of his current address, either.

The *Stevens* approach was softened somewhat by the Utah Supreme Court in *Jones v. Layton/Okland*, 2009 UT 39, 214 P.3d 859. "In order to obtain relief under *rule 60(b)* on the ground of excusable neglect a moving party need not necessarily prove that it has been forced into neglect by circumstances beyond its control." *Id.* at ¶19. The moving party must demonstrate "some evidence of diligence in order to justify relief." *Id.* at ¶20. The court summarized its holding as follows:

> Therefore, we hold that, in deciding whether a party is entitled to relief under *rule 60(b)* on the ground of excusable neglect, a district court must determine whether the moving party has exercised sufficient diligence that it would be equitable to grant him relief from the judgment entered as a result of his neglect. In making this determination, the district court is free to consider all relevant factors and give each factor the weight that it determines it deserves.

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Id. at ¶25.

The court finds that, even under the relaxed standard announced in *Jones*, there is no basis for granting relief to the plaintiffs under Rule 60(b)(1). Mr. Johnson has failed to demonstrate excusable neglect, as he has provided no evidence of his own diligence in his efforts to make his address available to the court and to opposing counsel. Whether he was kicked out of an office location or he voluntarily moved, it was his duty to notify the court and opposing counsel regarding his new location. It was his duty, at the least, to notify the post office, so that his mail could have been forwarded to each new address. It was also his duty to organize his office so that, despite his frequent moves, his mail was collected and important motions were brought to his attention. Mr. Johnson has provided no information to the court regarding any efforts to maintain an efficient office during his many office relocations.

The court finds that Mr. Johnson has not established that his failure to respond, on behalf of his clients, to the two motions for summary judgment was the result of excusable neglect under Rule 60(b)(1).

As the court has found that Mr. Johnson has not established excusable neglect, the court does not move to the third step, a meritorious defense. Mr. Johnson's Rule 56(f) Affidavit would have the court consider his claim that there are issues of fact yet to be resolved. Such analysis would only be appropriate under the court's consideration of a meritorious defense. Unfortunately, for Mr. Johnson's clients, the plaintiffs, the court cannot consider any type of a

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meritorious defense.

Because the court finds that there was no excusable neglect, the court denies the plaintiffs' *Plaintiffs' Request to Continue Time Period to Respond to Motions for Summary Judgment.*

CONCLUSIONS OF LAW

1. The court concludes that oral arguments are unnecessary with respect to all of the motions before the court.

2. The court concludes that Mr. Johnson's Rule 56(f) Affidavit was untimely and should be disregarded.

3. The court concludes that Mr. Johnson Rule 56(f) Affidavit did not establish excusable neglect under Rule 60(b)(1).

ORDER

1. The court denies all requests for oral arguments with regard to all pending motions.

2. The court denies *Plaintiffs' Request to Continue Time Period to Respond to Motions for Summary Judgment.*

Dated this 4th of May, 2010.

CLAUDIA LAYCOCK
Fourth District Court Judge

Case No. 070403371

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MAILING CERTIFICATE

I certify that a true copy of the foregoing ruling was mailed on 5 May 2010 to the following:

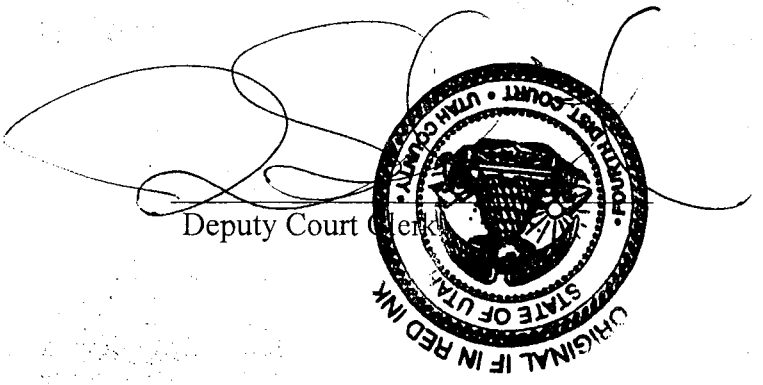
S. Austin Johnson[4]
PO Box 970880
Orem UT 84097-0880

S. Austin Johnson
359 E 1200 S
Orem UT 84058

Richard Glauser
Trevor Bradford
SMITH & GLAUSER
1218 E 7800 S Ste 300
Sandy UT 84094

Terry M. Plant
Jeremy M. Neeley
PLANT, CHRISTENSEN & KANELL
136 E South Temple Ste 1700
Salt Lake City UT 84111

Deputy Court Clerk



[4]The court notes that, on today's date, the address listed for Mr. Johnson with the Utah State Bar is 359 E 1200 S, Orem, UT 84058. However, Mr. Johnson used the PO Box address on his last filing with the court on February 8, 2010. Taking no chances, the court will send this ruling to both addresses.

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APPENDIX 5

DOCKET

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COPY

4TH DISTRICT COURT - PROVO
UTAH COUNTY, STATE OF UTAH

MARICELA QUISPE vs. DIAMOND LINE DELIVERY SYSTEM

SE NUMBER 070403371 Personal Injury

RRENT ASSIGNED JUDGE
CLAUDIA LAYCOCK
Division 3

RTIES

Plaintiff - OSCAR MERCADO
Represented by: S AUSTIN JOHNSON

Plaintiff - MARICELA QUISPE
Represented by: S AUSTIN JOHNSON

Defendant - LINDSEY HILL
Represented by: RICHARD K GLAUSER
Represented by: TREVOR A BRADFORD

Defendant - DIAMOND LINE DELIVERY SYSTEM
Represented by: TERRY M PLANT

COUNT SUMMARY

TOTAL REVENUE	Amount Due:	314.75
	Amount Paid:	314.75
	Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: COMPLAINT - NO AMT S		
	Amount Due:	155.00
	Amount Paid:	155.00
	Amount Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: JURY DEMAND - CIVIL		
	Amount Due:	75.00
	Amount Paid:	75.00
	Amount Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: JURY DEMAND - CIVIL		
	Amount Due:	75.00
	Amount Paid:	75.00
	Amount Credit:	0.00

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Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	1.75
Amount Paid:	1.75
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	1.75
Amount Paid:	1.75
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	0.50
Amount Paid:	0.50
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	1.50
Amount Paid:	1.50
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	2.00
Amount Paid:	2.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	2.25
Amount Paid:	2.25
Amount Credit:	0.00
Balance:	0.00

ASE NOTE

ROCEEDINGS

1-15-07 Filed: Summons Re: Diamond Line Delivery System
1-15-07 Case filed
1-15-07 Judge CLAUDIA LAYCOCK assigned.
1-15-07 Filed: Complaint
1-15-07 Fee Account created Total Due: 155.00
1-15-07 COMPLAINT - NO AMT S Payment Received: 155.00

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Note: Code Description: COMPLAINT - NO AMT S
-11-07 Filed: Answer
LINDSEY HILL

-11-07 Filed: Jury Demand
-20-07 Fee Account created Total Due: 75.00
-20-07 JURY DEMAND - CIVIL Payment Received: 75.00
Note: Code Description: JURY DEMAND - CIVIL, Mail Payment;
-26-07 Filed: Stipulation Regarding Punitive Damages
-31-07 Filed: Certificate of Return of Service
-25-08 Filed: Notice of Change of Address Effective January 18, 2008
-01-08 Filed: Defendant's Hill Certificate of Service Re Initial Disclosures
-13-08 Filed return: Subpoena Duces Tecum (Standard Insurance Company)
Party Served: Standard Insurance Company
Service Type: Personal
Service Date: May 06, 2008
-26-08 Filed: Notice of Depositions of Plaintiffs
-30-08 Filed: Certificate of Service
-18-08 Filed: Defendant's Amendment to Rule 26 Disclosures
-21-08 Filed: Certificate of Service
-25-08 Filed: Answer to Plaintiffs' Complaint and Intent to Apportion Fault
DIAMOND LINE DELIVERY SYSTEM

-25-08 Filed: Demand for Jury Trial
-10-08 Fee Account created Total Due: 75.00
-10-08 JURY DEMAND - CIVIL Payment Received: 75.00
Note: Code Description: JURY DEMAND - CIVIL, Mail Payment;
-18-08 Filed: Motion to Dismiss or Alternatively Compel Production of Documents
Filed by: HILL, LINDSEY
-18-08 Filed: Memorandum in Support of Defendant Hill's Motion to Dismiss or Alternatively Compel Production of Documents
-20-08 Filed: Request to Submit for Decision
-03-08 Filed order: RULING: Memorandum Decicision on Defendant Hill's Motion to Dismiss or Alternatively to Compel Production of Documents and Order
Judge CLAUDIA LAYCOCK
Signed November 03, 2008
-03-08 Filed: Plaintiff Mercado's Certificate of Service Re Hill Discovery Requests
-03-08 Filed: Plaintiffs' Response to Court Order, Dated November 3, 2008
-08-08 Filed: Renewed Motion to Dismiss
Filed by: GLAUSER, RICHARD K
-08-08 Filed: Memorandum in Support of Defendant Hill's Renewed Motion to Dismiss
-09-08 Filed order: Stipulated Discovery Plan and Order

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Judge CLAUDIA LAYCOCK
Signed December 08, 2008

2-17-08 Filed: Plaintiffs' Response to Renewed Motion to Dismiss
OSCAR MERCADO
MARICELA QUISPE

2-22-08 Filed: Certificate of Service for Defendant Diamond Line Delivery System's Initial Disclosures
2-22-08 Filed: Certificate of Service
2-22-08 Filed: Certificate of Service
2-29-08 Filed: Reply Memorandum in Support of Defendant Hill's Renewed Motion to Dismiss
1-05-09 Filed: Certificate of Service for Defendant Diamond Line Delivery System's First Set of Interrogatories and Requests for Production of Documents to Plaintiff Mercado
1-05-09 Filed: Certificate of Service for Defendant Diamond Line Delivery System's First Set of Interrogatories and Requests for Production of Documents to Plaintiff Mercado
2-09-09 Filed: Certificate of Service
2-09-09 Filed: Certificate of Service Re: Defendant Hill's Third Set of Requests for Production of Documents to Plaintiff
2-20-09 Filed: Notice of Deposition of Plaintiff's
4-13-09 Filed: Amended Notice of Deposition of Plaintiffs
4-17-09 Filed: Notice of Continuation of Deposition of Plaintiffs
4-27-09 Filed: Certificate of Service for Defendant Diamond Line Delivery System's Answers to Defendant Hill's First Set of Interrogatories and Requests for Production of Documents
4-27-09 Filed: Certificate of Service
5-04-09 Filed: Certificate of Service for Discovery
5-01-09 Filed: Defendant Lindsey Hill's Lay Witness Designations
5-01-09 Filed: Defendant Diamond Line Delivery Systems Designation of Lay Witnesses
5-02-09 Filed: Certificate of Service for Discovery
5-05-09 Filed: Notice of Deposition of David Teams
5-10-09 Filed: Certificate of Service for Defendant Diamond Line Delivery System's First Set of Interrogatories and Requests for Production of Documents to Defendant Hill
5-29-09 Filed: Notice of Deposition of Lindsey Hill
8-10-09 Filed: Motion for Entry of Scheduling Order
Filed by: HILL, LINDSEY
8-10-09 Filed: Memorandum in Support of Motion for Entry of Scheduling Order
9-02-09 Filed: Certificate of Service for Defendant Hill's First Set of Requests for Admissions to Plaintiffs
9-08-09 Filed: Certificate of Service for Defendant Diamond Line Delivery System's First Set of Reqeusts for Admission to Plaintiffs
9-10-09 Filed: Motion to Strike or Alternatively Motion to Compel Production of Documents

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Filed by: GLAUSER, RICHARD K
-10-09 Filed: Memorandum in Support of Defendant Hill's Motion to Strike, or Alternatively Motion to Compel Production of Documents
-14-09 Filed: Request to Submit for Decision on Motion for Entry of Scheduling Order
-01-09 Filed order: Second Amended Discovery Plan and Order
Judge CLAUDIA LAYCOCK
Signed September 29, 2009
-05-09 Filed: Notice of Entry of Appearance
-19-09 Filed: Defendant Lundsey Hill's Amended Lay Witness Designation
-23-09 Filed: Motion for Summary Judgment
Filed by: HILL, LINDSEY
-23-09 Filed: Memorandum in Support of Motion for Summary Judgment
-28-09 Filed: Defendant Diamond Line Delivery System's Motion for Summary Judgment
Filed by: DIAMOND LINE DELIVERY SYSTEM,
-28-09 Filed: Defendant Diamond Line Delivery System's Memorandum in Support of it's Motion for Summary Judgment
-12-09 Filed: Notice to Submit for Decision Diamond Line Delivery System's Motion for Summary Judgment
-16-09 **** SEALED **** Filed: Request to Submit for Decision on Defendant Hill's Motion for Summary Judgment
-24-09 Fee Account created Total Due: 1.75
-24-09 COPY FEE Payment Received: 1.75
Note: 2.00 cash tendered. 0.25 change given.
-25-09 Filed: Plaintiff's Response to Motion for Summary Judgment and Motion for Extension of Time to Respond
-07-09 Minute Entry - RULING ON DEF. HILL'S MOTION FOR SUMMARY
Judge: CLAUDIA LAYCOCK
This matter comes before the court upon the receipt of defendant Lindsey Hill's request to submit regarding her motion for summary judgment. Her motion was filed on October 23, 2009; it was mailed to plaintiffs' counsel 2 days earlier. The plaintiffs have not filed a response; their time for response, plus mailing, elapsed on November 9, 2009. The request to submit was filed on November 16, 2009.

The court has reviewed the defendant's memorandum and finds that the motion is well-taken. The plaintiffs' failure to respond to the defendant's requests for admissions leaves the court no alternative but to deem those facts submitted to find that the facts are undisputed, and to find that defendant Lindsey Hill is not responsible nor liable for the plaintiffs' injuries, if such injuries were significant enough to have merit in this action.

Pursuant to the above findings and conclusions, the court finds it unnecessary to address the defendant's second argument; the court also declines to award attorney's fees under the defendant's second

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argument. The court grants the motion for summary judgment and orders defendant Hill's counsel to prepare appropriate findings, conclusions, and an order of dismissal for the court's signature.

Date: _____

_____
Judge CLAUDIA LAYCOCK

2-15-09 Minute Entry - RULING ON DEF. DIAMOND LINE'S MOTION FOR
Judge: CLAUDIA LAYCOCK
This matter comes before the court upon the receipt of defendant Diamond Line Delivery System's request to submit regarding its motion for summary judgment. The motion was filed on October 28, 2009; it was mailed to plaintiffs' counsel on October 26, 2009. The plaintiffs' time for response, plus mailing, elapsed on November 12, 009. The request to submit was also filed on November 12, 2009. On November 25, 2009 the plaintiffs finally filed a document entitled "Plaintiffs (sic) Response to Motion for Summary Judgment and Motion for Extension of Time to Respond."

Arguably, the plaintiffs' response should be ignored by the court, as it was filed 13 days after the plaintiffs' time for response elapsed. Even upon consideration of the plaintiffs' response, the court finds that the response is inadequate under Rules 7 and 56 of the Utah Rules of Civil Procedure. If considered a direct response to a motion for summary judgment, the plaintiff's response fails, as it does not follow the clear instructions of Rule 7(c)(3)(B). If considered a Rule 56(f) motion to continue to obtain further discovery, the plaintiff's response also fails, as it does not contain an affidavit from their attorney or the plaintiffs themselves that they "cannot for reasons stated present by affidavit facts essential to justify the party's opposition." The attorney's signed response does not suffice under Rule 56(f).

Furthermore, the court has reviewed the defendant's memorandum and finds that the motion is well-taken. The plaintiffs' failure to respond to the defendant's requests for admissions leaves the court no alternative but to deem those facts submitted, to find that the facts are undisputed, and to find that defendant Diamond Line Delivery System is not responsible nor liable for the plaintiffs' injuries, if such injuries were significant enough to have merit in this action.

The court grants the motion for summary judgment and orders defendant Diamond Line Delivery System's counsel to prepare appropriate findings, conclusions, and an order of dismissal for the court's signature.

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Date: _____ _____
Judge CLAUDIA LAYCOCK

-24-09 Filed: Plaintiffs Motion and Memorandum to Quash or Withdraw Admissions
Filed by: JOHNSON, AUSTIN
-24-09 Filed: Plaintiffs Response to Proposed Findings of Fact, Conclusions of Law, and Order of Dismissal Submitted by Defendant Hill
-24-09 Filed: Plaintiffs Objection to Ruling on Defendant Diamond Line's Motion for Summary Judgment
-24-09 Filed: Plaintiffs Request to Continue Time Period to Respond to Motions for Summary Judgment
-24-09 Filed: Plaintiffs Request for Hearing
-08-10 Filed: Plaintiff's Response to Proposed Findings of Fact, Conclusions of Law, and Order of Dismissal
-12-10 Minute Entry - NOTICE TO ATTORNEYS
Judge: CLAUDIA LAYCOCK
The court has before it defendant Lindsey Hill's proposed findings, conclusions, and order of dismissal which were filed with the court on December 17, 2009. On the last day on which the plaintiffs could have objected, December 21, 2009, the attorneys for Lindsey Hill mailed the court a letter requesting that the court sign the previously filed documents. The court does not know when the letter was received at the courthouse, as the envelope was destroyed and the letter was not date-stamped upon its receipt.

On December 24, 2009 the plaintiffs filed the following documents with regard to defendant Lindsey Hill: (1) Plaintiffs' Request for Hearing; (2) Plaintiffs' Request to Continue Time Period to Respond to Motions for Summary Judgment; and (3) Plaintiffs' Response to Proposed Findings of Fact, Conclusions of Law, and Order of Dismissal Submitted by Defendant Hill.

The court will generously (for the plaintiffs' benefit) assume that Ms. Hill's attorneys' letter arrived at the same time as the plaintiffs' documents on December 24, 2009. Therefore, the court will not sign the proposed findings, conclusions, and order of dismissal, but will hold them unsigned in the file. The court will allow the briefing on the plaintiffs' various motions to go forward and will act further upon the receipt of a request for decision.

Lastly, the court orders the plaintiffs' attorney to change the heading on all future documents in this case to reflect correctly named defendants. As far as the court can determine, Joshua Stam is not a party in this case. The plaintiffs' documents are only making it to the correct file because the case number is correct.

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Date: _____ _____
Judge CLAUDIA LAYCOCK

1-13-10 Filed: Defendant Diamond Line Delivery System's Memorandum in Opposition to Plaintiffs' Motion to Quash or Withdraw Admissions
1-19-10 Filed: Defendant Hill's Partial Joinder in "Defendant Diamond Line Delivery Systems' Memorandum in Opposition to Plaintiffs' Motion to Quash or Withdraw Admissions"
1-19-10 Filed: Objection and Memorandum in Opposition to Plaintiffs' "Response to Proposed Findings of Fact, Conclusions of Law, and Order of Dismissal Submitted by Defendant Hill"
1-19-10 Filed: Defendant Hill's Memorandum in Opposition to Plaintiffs' "Motion and Memorandum to Quash or Withdraw Admissions"
1-21-10 Fee Account created Total Due: 1.75
1-21-10 COPY FEE Payment Received: 1.75
Note: 5.00 cash tendered. 3.25 change given.
1-25-10 Filed order: Findings of Fact, Conclusions of Law, and Order of Dismissal with Prejudice
Judge CLAUDIA LAYCOCK
Signed January 25, 2010
1-25-10 Case Closed
Disposition Judge is CLAUDIA LAYCOCK
2-04-10 Fee Account created Total Due: 0.50
2-04-10 COPY FEE Payment Received: 0.50
Note: 1.00 cash tendered. 0.50 change given.
2-04-10 Fee Account created Total Due: 1.50
2-04-10 COPY FEE Payment Received: 1.50
2-04-10 Filed: Plaintiffs Reply to Defendant Hill's Memorandum in Opposition to Plaintiffs' Motion to Quash or Withdraw Admissions
2-04-10 Filed: Plaintiffs Reply to Defendant Diamond Line Delivery Systems Memorandum in Opposition to Plaintiffs' Motion to Quash or Withdraw Admissions
2-04-10 Filed: Request to Submit Motion to Quash or Withdraw Admissions
2-04-10 Filed: Plaintiffs RESPONSE to Requests for Admissions from Defendant Hill
2-04-10 Filed: Plaintiffs RESPONSE to Requests for Admissions from Defendant Diamond Line Delivery System
2-04-10 Fee Account created Total Due: 2.00
2-04-10 COPY FEE Payment Received: 2.00
2-08-10 Filed: Plaintiff's Motion to Alter or Amend Judgments Entered on January 25, 2010
Filed by: MERCADO, OSCAR
2-08-10 Filed: Response, Objection and Memorandum in Opposition to Plaintiffs' "Request to Continue Time Period to Respond to

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Motions for Summary Judgment"
-08-10 Filed: Notice of Entry of Judgment
-16-10 Filed: Defendant Diamond Line Delivery System's Memorandum in Opposition to Plaintiffs' Motion to Alter or Amend Judgments Entered on January 25, 2010
-16-10 Fee Account created Total Due: 2.25
-16-10 COPY FEE Payment Received: 2.25
Note: 10.00 cash tendered. 7.75 change given.
-18-10 Filed: Request to Submit for Decision on Plaintiffs' "Request to Continue Time Period to Respond to Motions for Summary Judgment"
-01-10 Filed: Defendant Hill's Notice Regarding Expert Witness Designation

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